

ORIGINAL

(45)
8-19-02
RM

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEWIS JOHNSON,
Plaintiff

v.

ANTHONY PRINCIPI, Secretary of Veterans Affairs;
RODNEY KISCADDEN; ALICE FIDLER;
PEG WINTERS; IRVIN ERICKSON;
RAYMER KENT; and AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES LOCAL 1966,
Defendants

:
: No. 1:CV-00-1873
:

: (Judge McClure)
: *Jones*
:

FILED
HARRISBURG, PA
AUG 16 2002
MARY E. D'ANDREA, CLERK
Per *[Signature]*
Deputy Clerk

FEDERAL DEFENDANTS' RECORD IN
SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT:
VOLUME III

THOMAS A. MARINO
Assistant U.S. Attorney

KATE L. MERSHIMER
Assistant U.S. Attorney
228 Walnut St., 2nd Fl.
P.O. Box 11754
Harrisburg, PA 17108-1754
717-221-4482

Date: June 12, 2002

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In the Matter of:

LEWIS JOHNSON,

Complainant

v.

HERSHEL GOBEL, Acting Secretary
DEPARTMENT OF VETERANS AFFAIRS

Agency

00 AUG - 2 2000
) EEOC Hearing #
) 170-AO-8163X
)
) Agency Case No.
) 98-2320 8
)
)
)

Wednesday
July 26, 2000
Regional Counsel's Library
V. A. Medical Center
University & Woodlands Aves.
Philadelphia, Pennsylvania

The above-entitled matter came on for hearing,
pursuant to notice at 9:00 a.m.

BEFORE: HON. DONNA NUTTER-RODWELL
Administrative Judge

APPEARANCES

On behalf of the Agency:

CHRISTOPHER PERILLO, ESQUIRE
Regional Counsel's Office
V. A. Medical Center
University and Woodland Avenues
Philadelphia, Pennsylvania
(215) 823-5800 Ext 7682

On behalf of the Complainant:

WILLIAM DUMAS
20 Dumas Lane
Jonestown, Pennsylvania 17038

OFFICIAL REPORTER
Burke Court Reporting Company
58 Woodhurst Drive
Voorhees, New Jersey 08043
(856) 627-7733

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Raymer A. Kent	10	40	---	---
Randall Houck	42	46	---	---
Barbara Ann Kohr	50	51	57	57
Alice E. Fidler	60	63	74	---
Lewis Johnson	79	---	---	---

E X H I B I T S

<u>EXHIBIT</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
----------------	-------------------	--------------------

Complainant's Exhibits

C-1	5	103
-----	---	-----

P R O C E E D I N G S

1:28 p.m.

JUDGE RODWELL: We're on the record. Good morning everyone. I'm Donna Nutter Rodwell. As you know, I'm the Administrative Judge presiding over the hearing in this matter, which is the EEOC Complaint of Mr. Lewis W. Johnson, Complainant, vs. Togo D. West, Jr., Secretary for a little while longer, I guess -- is it -- who is it ...

MR. PERILLO: Hershel Gobel is now the Secretary, Acting Secretary of Veterans Affairs.

JUDGE RODWELL: Okay. So that is effective now. Hershel Gobel, who is the Acting Secretary, Department of Veterans Affairs, Agency; EEOC Hearing Number 170-A0-8163X, and Agency Number 98-2320.

I've been assigned to conduct the hearing, of course, and make a decision in this case. Present this morning, we have the Complainant, Mr. Lewis W. Johnson, who is represented by Mr. William J. Demas; and we also have the Agency Representative, Mr. Christopher Perillo, Counsel with the Agency; and we have his Technical Assistant today, Ms. Susette Flashel Umlauf -- is that -- and present today for the hearings; and our Court Reporter, Mr. Jack Burke, will be making the -- will be our Reporter for today and will be making what will be the only official record of what transpires here today.

1 The Complainant, Mr. Johnson, filed a Formal
2 Complaint in this matter in which he alleged that he was
3 discriminated against because of his color and race, black,
4 African-American, when on July 15, 1998, he learned he was
5 not selected for Housekeeping Aide WG-3566-2 position at
6 the Lebanon VA Medical Center; and that is the issue in the
7 case.

8 During the course of a pre-hearing conference
9 held on June 15, 2000, we discussed -- or I advised the
10 parties of their burdens of proof, the hearing procedures,
11 and, of course, my intent to issue a decision in this
12 matter.

13 My function is to serve as a presiding officer
14 and to insure an equitable, orderly, and expeditious
15 hearing and to see that the facts are developed fully on
16 which a fair decision can be made.

17 After the close of the hearing, I'll be reviewing
18 the case, the Complaint filed, the record, and I'll be
19 preparing my decision. I will probably be issuing my
20 decision into the record at a later date by form of a
21 telephone conference.

22 The transcript of the hearing -- what will take
23 place today -- copies of the transcript will be mailed
24 directly to the parties. In other words, Mr. Perillo and
25 Mr. Johnson or Mr. Dumas on behalf of Mr. Johnson. I will

1 get the original of the hearing transcript.

2 The decision portion, we do a little bit
3 differently. I'll be getting the original and the copies
4 of the transcript, at the Agency's cost, of course; but
5 I'll be getting that of the Decision; but the hearing --
6 and also when you get copies of the hearing transcript,
7 they will not have the exhibits attached to them. The
8 original will. It goes to the Agency's Designated
9 Official, who will be making or taking a final action or
10 order with regards to this case. So hold on, you know, to
11 your exhibits for the -- that you have today.

12 And when I mark the exhibit, for example, the one
13 that was introduced by the Complainant, the excerpt from
14 the agreement between the Agency and the Union, make sure
15 that you mark and note what exhibit marking it has. It
16 will, in fact, be Exhibit C-1, you know, and I will
17 introduce that into the record; and the Agency did
18 stipulate, you know, that the portion or the excerpt says
19 what it says.

20 (The Document referred to as exhibit C-1 was
21 marked for identification.)

22 JUDGE RODWELL: And that is in Article 11 -- I'm sorry
23 -- excuse me. Article 12 on Details, Reassignments and
24 Temporary Promotions, in Section 10 which refers to
25 Reassignments. And what I'm going to do is get -- is copy

1 that Article 12, which is only about 1, 2, 3, 4, 5 pages,
2 and we'll just include that.

3 MR. PERILLO: Judge, my understanding had been Article
4 12, Section 10(b).

5 JUDGE RODWELL: That's what you're stipulating -- the
6 stipulation is to Article 12, Section 10(b), but I'll
7 probably ...

8 MR. PERILLO: Understood.

9 JUDGE RODWELL: ... as I said, include the Article.

10 MR. PERILLO: Sorry about that.

11 JUDGE RODWELL: Okay. That's fine. That's good,
12 because we need to be clear that the stipulation goes to
13 what is said in that specific section, Article 12, Section
14 10(b), which is Page 34 of that. Okay?

15 So, during the course of the hearing, I approved
16 witnesses for the Complainant. I approved the Complainant,
17 Randall Houck, Ray Kent and Joan Welsh Maher. The
18 Complainant has informed me that he will not be testifying.
19 He's going to rely on the record, his affidavit and I guess
20 other statements contained in the record. Ms. Joan Welsh
21 Maher has been excused. She was going to testify regarding
22 that Exhibit C-1, which the Agency has made a stipulation
23 to what it says, and it does speak for itself as well.

24 So for the Complainant, testifying today will be
25 Mr. Kent and Mr. Houck. For the Agency will be Alice

1 Fidler and Barbara Kohr.

2 The parties have been advised several times that
3 the Complaint filed and Report of Investigation is a part
4 of the record. Any reference to any document not contained
5 therein shall be made by identifying it -- excuse me -- any
6 reference to a document contained in that file shall be
7 referenced by the title and exhibit marking in the file.
8 References to any documents not contained in the file shall
9 be made by introducing it -- presenting a copy to the
10 opposing party, if you haven't done so, which you should
11 have done so, and presenting it to me and marking for
12 identification purposes; and if it is relevant, and there
13 are no objections, it will be entered into the record. If
14 there are objections, I'll make rulings on those
15 objections.

16 And at this time, we're going to go on and
17 proceed with the case. Do you wish to make an opening
18 statement?

19 MR. DUMAS: First of all, I'd like to mention
20 something. I do not have the top cover sheet for the
21 investigation, so I'm going to refer to the contents
22 probably by B-3 or B-4, and exactly what they are.

23 JUDGE RODWELL: Does that copier work, Mr. -- is that
24 a copier; and does it work?

25 MR. PERILLO: I'm sorry; what were you saying?

1 JUDGE RODWELL: That front page on the right.

2 MR. DUMAS: I need a cover sheet and the Table of
3 Contents; that's what I need, the Table of Contents.

4 MR. PERILLO: You don't have this?

5 MR. DUMAS: No.

6 JUDGE RODWELL: Flip over -- it's not on the other
7 side?

8 Thank you. Do you have this? It doesn't look like you
9 have this either. Ms. -- could you -- and that one, too.
10 Thank you. He doesn't have the top page of the right side.

11 MR. PERILLO: We'll take care of that.

12 MR. DUMAS: Thank you. You know something ...

13 JUDGE RODWELL: We can go off the record.

14 (Off the record.)

15 (On the record.)

16 JUDGE RODWELL: Are you going to make an opening
17 statement, Mr. Dumas?

18 MR. DUMAS: Yes.

19 JUDGE RODWELL: Okay. You may proceed with that.

20 MR. DUMAS: What we intend to show here this morning
21 is quite simply. Mr. Johnson, a long-time employee with
22 the Lebanon VA, was denied a position due solely on his
23 case -- on his race, African-American, and that the
24 Selecting Official, in her decision to elect him, took
25 into consideration his race. We expect to show that the

1 Agency, in fact, was aware of this; and by their action,
2 condoned this, circumventing certain procedures to show
3 that Mr. Johnson did not obtain the particular position in
4 Extended Care 19-C -- 19-3. And simply, we're going to
5 show this. The record is clear.

6 JUDGE RODWELL: I m sorry; excuse me. You said
7 circumvented certain ...

8 MR. DUMAS: Procedures ...

9 JUDGE RODWELL: ... procedures ...

10 MR. DUMAS: -- Management procedures in particular,
11 ...

12 JUDGE RODWELL: Uh, huh.

13 MR. DUMAS: To assure that Mr. Johnson did not get
14 that position, which Mr. Johnson was entitled to, by virtue
15 of being Employer (sic) at that VA with certain
16 entitlements; and that Mr. Johnson simply again was not
17 wanted on that floor because the Selecting Official had a
18 particular animus toward people of color.

19 Thank you.

20 JUDGE RODWELL: Okay. Off the record.

21 (Off the record.)

22 (On the record.)

23 JUDGE RODWELL: We can go on the record. I am
24 Administrative Judge Donna Rodwell presiding over the
25 hearing today, Mr. Kent; and you've been approved as a

1 witness. Do you have any objection, sir, to taking an
2 oath?

3 WITNESS: None.

4 Whereupon,

5 RAYMER A. KENT

6 having been first duly sworn, was called as a witness
7 herein and was examined and testified as follows:

8 JUDGE RODWELL: State your full name for the record,
9 please.

10 WITNESS: My name is Raymer A. Kent.

11 JUDGE RODWELL: And could you spell that, please.

12 WITNESS: R A Y M E R; A for the middle initial; Kent,
13 K E N T.

14 JUDGE RODWELL: Okay. Okay, Mr. Kent. This is Mr.
15 Dumas, Mr. Lewis Johnson's representative today. He's
16 going to start asking you some questions, and Mr. Perillo,
17 the Agency Representative will probably have some questions
18 for you as well.

19 You may proceed, Mr. Dumas.

20 DIRECT EXAMINATION

21 BY MR. DUMAS:

22 Q Good morning, Mr. Kent.

23 A Morning.

24 Q Mr. Kent, I'm going to ask you a series of
25 questions. I'm not an attorney. I'm not going to use any

1 legalese. I'm going straight to the point, and hopefully
2 you can answer those questions likewise.

3 Mr. Kent, first of all, what's your title at the
4 Lebanon VA?

5 A Human Resources Manager.

6 Q Mr. Kent, does that indicate that you are in
7 charge of that Agency -- that particular area of the VA?

8 A Yes; I'm in charge of Human Resources.

9 Q And for the most part, I would assume -- and
10 please answer this -- you are familiar with procedures in
11 hiring, firing, that sort of thing?

12 A Yes.

13 Q Mr. Kent -- Mr. Kent -- just to get right to the
14 nutshell of this thing, I have a document, and I d like to
15 present to you, if it's appropriate.

16 JUDGE RODWELL: Okay. Just tell us where it is -- at
17 the tab marking.

18 MR. DUMAS: Okay. That's C-3.

19 JUDGE RODWELL: It looks like C-3 -- it looks like the
20 second page of C-3, Request for Personnel Action?

21 MR. DUMAS: That's correct.

22 JUDGE RODWELL: Okay.

23 Q Mr. Kent, from your experience, can you enlighten
24 us as to what this document entails.

25 A It's a promotion action from Housekeeping Aide

1 WG-1 to Housekeeping Aide WG-2.0

2 Q Mr. Kent, what's the party's name listed on that
3 document?

4 A Ronald Hall.

5 Q Are you saying that this person, Mr. Hall, went
6 from one position to another; and the position he went to
7 was?

8 A He went from Housekeeping Aide GS -- WG-1 to a
9 Housekeeping Aide WG-2 in a different Unit.

10 Q In a different Unit? When you say he went to a
11 different Unit, are we saying here that -- first of all,
12 let's -- let me backtrack. The position that he went from,
13 is there anything there that would -- let's say -- like
14 distinguish Mr. Hall from a regular part -- full-time term
15 employee -- anything noticeable there?

16 A He was a part-time, permanent employee.

17 Q And the position he went to?

18 A Was a full-time, permanent position.

19 Q And Mr. Kent, if you can, can you tell us when
20 this occurred?

21 A The effective date of record was 6/7/98.

22 Q And on 6/7/98, this person that you mention
23 there, Mr. Hall, was employed by Lebanon VA by what -- any
24 particular Unit?

25 A He was in Operations Section, the -- he probably

1 would have been in EMS, which is Environmental Management
2 Unit of Operations Section, Facilities Management Division.

3 Q Okay. Mr. Kent, let me ask that again, please.
4 As a part-timer, what Unit was Mr. Hall with?

5 A Environmental Management Section of Facilities
6 Operations at the Medical Center.

7 Q What employees, which would include Mr. Johnson,
8 are employed by that particular Unit?

9 A Housekeeping Aides that generally do weekend work
10 in the halls and walls and central areas of the Medical
11 Center.

12 Q Mr. Kent, you stated they generally do -- they
13 generally do weekend work. Within the area you just
14 mentioned, and I'll re-read this, if you don't mind, EMS,
15 ...

16 A Uh, huh.

17 Q You mentioned weekend work. Do those people in
18 that area also work during the week?

19 A Certainly.

20 Q Regular eight-hour -- seven-hour shift?

21 A Some.

22 Q So for the most part, are we saying that
23 generally those people are full-time or are they more part-
24 time?

25 A There are more full-timers than there are part-

1 timers.

2 Q Thank you, Mr. Kent. Mr. Kent, on the effective
3 date that you gave us, 6/7 -- June 7, '98, on the document
4 that you have in front of you, where was Mr. Hall employed?
5 What Unit was Mr. Hall employed?

6 JUDGE RODWELL: You mean after he was selected?

7 Q On June 6, '98, where was Mr. Hall employed?

8 A June 6 or June 7?

9 JUDGE RODWELL: The effective date ...

10 MR. DUMAS: I stand corrected.

11 Q June 7?

12 A He was employed in Extended Care.

13 Q Is Extended Care and EMS one Unit?

14 A No.

15 Q Separate and distinct Units?

16 A Yes.

17 Q So as of June 7, Mr. Hall was no longer
18 supervised by EMS -- he was no longer employed by EMS, so
19 to speak. He was now under the jurisdiction of Extended
20 Care; am I correct?

21 A That's what it says.

22 Q Okay.

23 MR. DUMAS: Can I -- if we don't need that again. I
24 may refer to it. I just want to get it in front of me
25 here. I apologize for doing this, but I need to refer to

1 it.

2 Q Now Mr. Kent, can you tell us here what is a
3 conditional employee?

4 A Career conditional employees are employees that
5 are -- have been hired within three years, under the normal
6 Civil Service Regulations. After three years, they go to
7 career status.

8 Q Would a person in that status be considered a
9 probationary employee, if that person was hired on June 7,
10 '98 ...

11 JUDGE RODWELL: Excuse me. Would he be considered a
12 what employee?

13 MR. DUMAS: A probationary employee -- let me
14 backtrack again.

15 JUDGE RODWELL: I -- I -- excuse me.

16 MR. DUMAS: I'm sorry.

17 JUDGE RODWELL: Excuse me. I hate -- excuse me for
18 interrupting. I'm trying to -- what is the relevance of
19 this? Is Mr. Hall -- is he -- I'm just going to ask if Mr.
20 Hall was the -- well, no; go on. I'll let you go on. Go
21 on.

22 Q Okay. I should have asked you this, sir.
23 What is a probationary employee?

24 A Under General Schedule or Excepted Employment,
25 probationary employees are in their first year of

1 employment in a permanent position.

2 Q In this respect, as of June 15, 1998, would Mr.
3 Hall have been considered a probationary employee?

4 A Can't answer that without knowing what date he
5 started employment.

6 Q Let me rephrase the question.

7 On June 7, 1998, in a new position, Housekeeping
8 Aide WG-2, full-time, would he have been considered a full-
9 time employee?

10 A Not necessarily. It's based on your initial date
11 of employment into a permanent position.

12 JUDGE RODWELL: According -- according to this, and I
13 -- 'cause we really need to move along. I'm trying to
14 capture the relevance of this, and I m -- the document in
15 C-3 that we were referring to shows that Mr. Hall was a
16 permanent, part-time -- this is -- I'm reading from the
17 document -- employee who was apparently changed or upgraded
18 to a permanent -- excuse me -- yes; a permanent, full-time
19 employee, effective June 7, 1998.

20 I know that he has a service computation date of
21 1991. I don't -- that doesn't tell me when he became a
22 permanent employee. That's just a service computation
23 date, and he apparently did have some military service,
24 according to down here.

25 WITNESS: I think he had like 15 or more ...

1 JUDGE RODWELL: Fifteen.

2 WITNESS: ... military ...

3 JUDGE RODWELL: Right; so I understand your answer to
4 be whether he was a probationary employee or not depends on
5 when he became a permanent employee; is that ...

6 WITNESS: Right; when he was initially -- initially
7 hired in a permanent position in a continuous service
8 thereafter, would meet the qualifications for the
9 conversion from a probational status to a career-
10 conditional status.

11 JUDGE RODWELL: Now you can go on, Mr. Dumas.

12 MR. DUMAS: Okay. Thank you.

13 Q Mr. Kent, according to the records, Mr. Hall was
14 hired in October 24, 1997.

15 JUDGE RODWELL: And where are you getting this from?
16 According to what records?

17 MR. DUMAS: Statement of -- I believe it was Alice
18 Fidler.

19 JUDGE RODWELL: Which is ...

20 MR. DUMAS: She may have just said October, '97; and
21 not the date.

22 JUDGE RODWELL: Which is at B-5.

23 MR. DUMAS: I believe it's Alice Fidler.

24 JUDGE RODWELL: Page 7 of Exhibit B-5. Okay. Can I
25 ask just where you're getting at or to?

1 MR. DUMAS: What we're trying to show here by the
2 document that we have here, the Personnel Action Form, has
3 nothing whatsoever to do with the hearing here. That is
4 not the document that put Mr. Hall in the position that's
5 in question here; but it does show that it put Mr. Hall in
6 the same level as Mr. Johnson, and any position -- and this
7 position, particularly; it would have been a reassignment.
8 Reassignments are decided according to the seniority of the
9 individuals; nothing more.

10 JUDGE RODWELL: Okay. Well, can we -- let's kind of
11 move along toward that, then.

12 Q Mr. Kent, again, October 24, 1997, Mr. Hall came
13 on duty. On June 15, '98, would he have been a
14 probationary employee?

15 A Yes.

16 Q Do -- do probationary employees ...

17 JUDGE RODWELL: I'm sorry; as of what date would he
18 have been a probationary employee?

19 MR. DUMAS: June 15, '98.

20 JUDGE RODWELL: Okay. Go on.

21 Q Do probationary employees, normally at the VA
22 Hospital, apply for and obtain promotions?

23 A Yes.

24 Q Do probationary employees normally -- can a
25 probationary employee apply for and receive reassignments?

1 A Yes.

2 Q Can probationary employees, in those two areas
3 that I mentioned, can they be -- can that person be
4 considered more qualified or considered for that position
5 over an individual who is a non-probationary employee?

6 A Yes.

7 Q Mr. Kent, we've ascertained here that Mr. Hall,
8 as of June 7, 1998, was no longer in Housekeeping EMS.

9 A Okay.

10 Q Are you familiar with the term, Supervisory
11 Appraisal?

12 A Yes.

13 Q Can you explain to us what a Supervisory
14 Appraisal is?

15 A Yes. Appraisal -- a Supervisory Appraisal is a --
16 an evaluation by -- normally by a first-line supervisor --
17 of an employee's performance in a position.

18 Q Are we saying that the individual indicated on
19 the supervisor form would be appraised by his or her
20 Supervisor; am I to understand that?

21 A Yes; Supervisor of Record, however, may not be
22 the one that is immediately there on that day and time.

23 MR. PERILLO: Excuse me, Mr. Dumas.

24 MR. DUMAS: Yes.

25 MR. PERILLO: If it will help you, I'm willing to

1 stipulate that the two finalists for the selectee and your
2 client -- and they had equal scores in the supervisory
3 appraisals. If that will help get ...

4 MR. DUMAS: Okay. I appreciate that, but we're not
5 getting -- going there.

6 MR. PERILLO: Okay.

7 MR. DUMAS: And I thank you.

8 Q Mr. Kent, again, I would like to show you a
9 document here -- particularly supervisory appraisal ...

10 A It's behind Tab C-3. You showed me Ronald Hall's
11 supervisory appraisal dated 6/15/98.

12 JUDGE RODWELL: Okay. Is there a question?

13 MR. DUMAS: Yes.

14 Q Mr. Hall -- correction -- Mr. Kent. Mr. Kent,
15 ...

16 A Uh, huh.

17 Q ... you indicated that's Mr. Hall's appraisal?

18 A Yes.

19 Q On the very top of that form, does it indicate
20 what Unit Mr. Hall was with?

21 A Extended Care.

22 Q So we would immediately assume that's the
23 supervisory appraisal from the Supervisor in Extended Care?

24 A You could assume that; but you'd be wrong.

25 Q Uh, huh.

1 A Because the Supervisor, in order to rate an
2 employee, the Supervisor has to supervise him for a
3 reasonable period of time, which is normally defined in the
4 records -- Regulations -- as 90 days or more. And in this
5 case, he hadn't been in Extended Care for 90 days.

6 Q A very long statement -- a very long statement,
7 but if I can just shorten it a bit -- at the very -- at the
8 very top of this form, left and right side, it indicates in
9 this area, someone who should complete this form.

10 A I can point one out over this one here.

11 JUDGE RODWELL: What are we -- excuse me, what are we
12 getting to here?

13 MR. DUMAS: Okay. Again, again ...

14 JUDGE RODWELL: I m having -- the form speaks ...

15 MR. DUMAS: This form ...

16 JUDGE RODWELL: Let me ask ...

17 MR. DUMAS: Yes.

18 JUDGE RODWELL: Can you look at this and tell who
19 rated -- who filled out this form for Mr. Hall?

20 WITNESS: Yes. Michael Brennan.

21 JUDGE RODWELL: Michael Brennan; okay.

22 WITNESS: Who had been his Supervisor in Environmental
23 Management.

24 JUDGE RODWELL: Okay.

25 Q And one other person there.

1 A Dennis Firestein, who is the next level
2 Supervisor.

3 MR. DUMAS: It is our argument that neither of those
4 persons was at the time, June 15th, neither of those
5 persons was Mr. Hall's Supervisor.

6 JUDGE RODWELL: And the witness has just explained
7 those situations that in order to do the supervisory
8 appraisal, normally the supervisor has to supervise the
9 employee for a reasonable period of time, and that is
10 usually 90 days or more; and that Mr. Hall had not been in
11 the new Unit for 90 days; and that these Supervisors were
12 his Supervisors in his former Unit. That is the witness'
13 testimony.

14 MR. DUMAS: Okay. On the form, it indicates, for the
15 most part, if a person is not able to be super -- appraised
16 because for whatever reason, he should be given a zero.

17 JUDGE RODWELL: Sir, you're not going to get very far.
18 You're not going to get very far with that. I mean I can't
19 ...

20 MR. DUMAS: But this is ...

21 JUDGE RODWELL: This is his testimony, and that's
22 argument that you're giving.

23 MR. DUMAS: But I'm actually going to refer to that.

24 JUDGE RODWELL: You can save that for closing
25 argument.

1 MR. DUMAS: I was going to ask him to refer to -- I
2 was going to ask him to refer to the statement there that
3 indicates who should complete the form. It states clearly
4 the Supervisor completes these forms.

5 JUDGE RODWELL: Okay.

6 MR. DUMAS: It doesn't say a past Supervisor. It says
7 just Supervisor.

8 JUDGE RODWELL: I know; but ...

9 MR. DUMAS: I don't care why they did it.

10 JUDGE RODWELL: Can you explain -- if you can -- if
11 you can shed some light on that any more, I guess, than
12 what you've just stated.

13 WITNESS: We would not allow a Supervisor who has not
14 supervised an employee for more than 90 days to complete
15 any rating of record; and this would be a rating that we
16 utilize in a formal process. So therefore, in order for it
17 to be a valid rating, it needs to have someone who can
18 adequately judge that employee's performance; and we always
19 reach back, if a person has not been in a position for 90
20 days, and have the ratings done by the previous Supervisor.

21 MR. DUMAS: Judge Rodwell, I can understand ...

22 JUDGE RODWELL: Excuse me. You ask questions, Mr.
23 Dumas.

24 MR. DUMAS: Yes.

25 JUDGE RODWELL: This is not a time to make an argument

1 for the case.

2 MR. DUMAS: I'd like to ask Mr. Kent ...

3 JUDGE RODWELL: But this is not is unusual; I mean
4 this, believe me, ...

5 MR. DUMAS: I understand. I want Mr. Kent to refer to
6 the form. I m not concerned with his testimony. I want to
7 testify ...

8 JUDGE RODWELL: I want to move on -- I want to move on
9 to something else, and I hope that's what you're doing.

10 MR. DUMAS: No; I ...

11 JUDGE RODWELL: Because we're finished with that line
12 of ...

13 MR. DUMAS: Miss ...

14 JUDGE RODWELL: Excuse me. Let me speak first, and
15 you'll have an opportunity. I want to move on to a
16 different line -- I'm instructing you to move on to a
17 different line of questioning, and we need to get away from
18 that line of questioning about why his past Supervisors
19 rated -- filled out that form. We need to move on to
20 something else.

21 MR. DUMAS: Okay.

22 Q Mr. Kent, are you familiar with the position of
23 Housekeeping Aide WD-2?

24 A Yes, sir.

25 Q In your familiarization with that position, and

1 the qualifications for that position, do you recall whether
2 or not there is any type of qualifications that indicate
3 one should have any particular type of training in the
4 chemical field?

5 A The position involves the use of hazardous
6 chemicals.

7 Q Does the position indicate one should have
8 knowledge of MSDS, Material Safety Data Sheets?

9 MR. PERILLO: Stipulate that it does.

10 Q Mr. Kent, can any employee (sic) qualifications
11 (sic) -- can any prospective employee's qualifications that
12 are not -- those qualifications are not on the
13 qualification sheet for Housekeeping, can a employee be
14 considered for the position at -- those qualifications have
15 nothing whatsoever to do with the qualification sheet, if
16 you follow what I'm saying here?

17 A Theoretically, yes; but your question you asked
18 was nothing whatsoever. The screen-out item for
19 qualification requirement for Housekeeping Aide is the
20 ability to do the duties of the position.

21 Q Does that include being trained -- let me
22 rephrase that.

23 Is being trained, setting up and/or teaching MSDS
24 -- is any qualification whatsoever for the position,
25 Housekeeping Aide?

1 MR. PERILLO: Stipulate in -- stipulate that it's not
2 part of the position description as we did before. Also
3 objection to the relevance of it. We stipulated that your
4 client and Mr. Hall were qualified for the position.

5 Mr. Kent was not the Selecting Official.

6 Q Mr. Kent, I'd like to ...

7 JUDGE RODWELL: Hold on. Hold on. Hold on one
8 moment. I want to state -- okay, Mr. -- the Agency,
9 through Mr. Perillo, by Mr. Perillo, has stipulated that --
10 I guess that the requirement of being trained in or
11 experience with MSDS, which is a chemical?

12 MR. PERILLO: Material Safety Data Sheets.

13 JUDGE RODWELL: Oh, Material Safety ...

14 MR. PERILLO: Data Sheets.

15 JUDGE RODWELL: I'm sorry. Material Safety Data
16 Sheets was not a part of the qualifications listed on the
17 position or the Vacancy Announcement. That -- that is a
18 stipulation. And the second stipulation was that both the
19 Complainant, Mr. Johnson, and Mr. Hall were qualified for
20 the position.

21 Now is your question to this witness -- strike
22 that.

23 Are you asking this witness if a Selecting
24 Official can require or additional qualifications that
25 aren't listed Job Announcement; is that what you're asking?

1 MR. DUMAS: Can the Selecting Official supercede the
2 qualification and add their own qualifications?

3 JUDGE RODWELL: Mr. Kent, if you can answer that
4 question:

5 Can the Selecting Official add qualifications?

6 WITNESS: The Selecting Official does not dictate
7 qualifications, but they do evidence preference.

8 MR. DUMAS: I don't think that's answer (sic) the
9 question.

10 JUDGE RODWELL: What do you mean by evidence
11 preference?

12 WITNESS: They can make a selection based on whom they
13 feel is most qualified of the qualified candidates that are
14 referred to them meeting the basic qualifications. Human
15 Resources screens and refers basic qualifications for the
16 position.

17 MR. DUMAS: May I?

18 JUDGE RODWELL: Yes.

19 Q Mr. Kent, again, can an -- can an -- simple --
20 can a Selecting Official add their own qualifications that
21 are not listed in the qualification indicated?

22 MR. PERILLO: Stipulate that they can t.

23 A No.

24 MR. DUMAS: Now I'm asking the witness.

25 JUDGE RODWELL: And he answered the question.

1 WITNESS: I said no.

2 JUDGE RODWELL: Okay.

3 Can a Selecting Official, Mr. Kent, -- can a
4 Selecting Official look at whether or not a candidate for
5 that Housekeeping position -- or consider -- take into
6 consideration in his or her determination, whether a
7 candidate would be trained in the use or setup of this
8 Material Safety Data Sheets?

9 WITNESS: Certainly. They can take into consideration
10 all -- all evidence in the record, employee's file -- all
11 their skills, abilities and other characteristics that
12 would qualify them for the position.

13 JUDGE RODWELL: Okay.

14 Q Mr. Kent, is there anything -- anywhere, to your
15 best recollection; is there any mention, in any form or
16 fashion, that an individual should be qualified, or need to
17 be qualified, or should have any qualification whatsoever,
18 not only MSDS, but in any type of chemical training,
19 reaction to chemicals, et cetera?

20 MR. PERILLO: Didn't we just stipulate?

21 MR. DUMAS: I didn't -- answer my question, please.

22 JUDGE RODWELL: Answer the question.

23 A None in the basic qualifications.

24 Q Mr. Kent, ...

25 JUDGE RODWELL: Okay. We need to move on to another

1 line of questioning.

2 MR. DUMAS: Okay.

3 JUDGE RODWELL: I just want -- you know, I just want
4 to explain that, you know, oftentimes -- oftentimes,
5 employee Selecting Officials consider different experiences
6 that candidates have that aren't necessarily set forth in
7 the qualifications; and that's a determination -- actually,
8 that is a conclusion that I'm following; but we need --
9 that's why we need to move on to a line of questioning as
10 opposed to arguing over this.

11 This -- this -- the Agency has stipulated;
12 therefore, it is an undisputed fact that whatever these
13 requirements are, were not specifically set forth in the
14 Vacancy Announcement. That is a stipulation, and it is
15 evident; and I think it's an undisputed fact, as well, that
16 the Selecting Official took into consideration -- or at
17 least said she took into consideration, experience in those
18 areas; so we need to move on. There's no need to argue
19 about it. That's ...

20 Q Mr. Kent, are you familiar with a procedure
21 whereby Management and Union rate individuals who are
22 applying for positions?

23 A No. The question may have been re -- miss --
24 phrased, however. Management, including employees, and
25 most often with a Union observer, evaluate candidates for

1 basic qualifications, and then rate them for consideration
2 for referral for promotion or reassignment.

3 Q And that done, what is done with that after the
4 rating process is done?

5 A After the rating process is done, a high-
6 qualified line is determined, the best qualified candidates
7 for promotion. Other candidates that are rated and deemed
8 qualified for reassignment are also referred at the same
9 time to the Selecting Official for their review, either by
10 review of the records or review of the records and an
11 interview, and then selection.

12 Q Is there any other rating process that you are
13 aware of?

14 A Not within our internal promotion plan.

15 Q Perhaps reassignment plan? Do you know of any
16 other rating procedure?

17 A There is no reassignment plan. Reassignments are
18 an option of Management.

19 Q Sir, I think I might have got off at the wrong
20 question asked; but what I'm trying to say is this: Is
21 that the only -- the only way to rate employees is the
22 situation that you just elaborated?

23 A The only way to rate employees for referral --
24 qualification and referral for promotion is the way I
25 defined it.

1 Q What about actually rating the person for the
2 position vs. referral?

3 A Are you referring to ...

4 JUDGE RODWELL: That's what that is.

5 A ... Supervisory appraisal?

6 Q No; I'm not referring to Supervisory appraisal.
7 What I'm asking you, is this ...

8 JUDGE RODWELL: Excuse me; he's answered your
9 question.

10 He's answered your question, sir. He explained how
11 individuals are rated and referred to the Selecting
12 Official.

13 MR. DUMAS: Okay. I understand that. I'm just ...

14 JUDGE RODWELL: And that's where his job ends. Mr.
15 Kent's job ends after it gets to the Selecting Official.
16 Normally -- is that correct? When I say your job ends, I
17 mean ...

18 WITNESS: I have oversight to make sure they don't do
19 something incorrect.

20 JUDGE RODWELL: Okay.

21 WITNESS: But normally, at that point, the Selecting
22 Official can evaluate the candidates. They're given the
23 access to the employee personnel folders, et cetera; and
24 then it's up to them whether or not they choose to
25 interview and then make a selection.

1 Q But there's no other rating process, then?

2 A (No response.)

3 Q A simple question. There's no other rating
4 process?

5 JUDGE RODWELL: What -- maybe it would help us ...

6 MR. DUMAS: I just need that answer.

7 JUDGE RODWELL: He's answered the question.

8 MR. DUMAS: I'd like him to answer ...

9 JUDGE RODWELL: I don't want him to say anymore. He's
10 sufficiently answered that question. I don't know what
11 you're getting at. "Is there any other rating process?"

12 MR. DUMAS: Is there any other rating process? He
13 said no. I wanted to make sure.

14 JUDGE RODWELL: He said no; so what else do you want
15 to know. He said no. If that -- Are you aware of any
16 other rating process with regards to ...

17 WITNESS: Not for referral, for promotion or
18 reassignment. Certainly, Supervisors, who are Selecting
19 Officials, are going to review their candidates; and they
20 have their own in -- procedure that they've determined to
21 separate candidates and decide who brings the most skills
22 to the job in order to be selected. But that's an informal
23 process.

24 JUDGE RODWELL: Are there -- are there any
25 requirements that are imposed upon the Selecting Officials

1 when it gets to the Selecting Officials -- for rating, or
2 ...

3 WITNESS: Within -- within a list of referrals -- in
4 other words, we refer lists of reassignment candidates, a
5 list of promotion candidates; they should treat people
6 equally. That is our own internal requirement; but beyond
7 that, none.

8 JUDGE RODWELL: Okay. He's answered the question, Mr.
9 Dumas. We again need to move on.

10 Q Mr. Kent, according to the regulations, do you
11 know of any procedure where KSOA's (sic), once completed,
12 are used in a rating process?

13 A That is the procedure they use in the rating
14 process. They re evaluated by a group of subject matter
15 experts, under the guidance of Human Resources and the
16 Union; ...

17 Q Once that's ...

18 A ... and using the KSAO's, are given a numerical
19 score relative to each other; and a rating guide; and
20 evaluated in that process.

21 Q Is there any other procedure inasmuch the KOSOA's
22 (sic) are utilized ...

23 JUDGE RODWELL: Okay. Excuse me. I need to kind of
24 cut this short. I'm having a very difficult time. Let me
25 -- I just have a question to ask.

1 If -- could you -- I'm going to ask you -- this
2 document is in Exhibit C-3, and could you just tell me what
3 that document is.

4 WITNESS: It's a referral list for consideration for
5 promotion to the position of Housekeeping Aide WG-2 in
6 Extended Care.

7 JUDGE RODWELL: Okay. And is that the certificate of
8 promotion that would have been with the certificate of
9 eligibles that would have been sent to the Selecting
10 Official?

11 WITNESS: One of maybe more than one. This is
12 reassignment, also. These people are all already WG-2's.
13 There may have been -- and I don't know for sure -- another
14 list of people who were in, you know, clerical jobs or
15 other jobs that wanted to get promoted to the position.

16 JUDGE RODWELL: So there may have been a promotion
17 eligible list?

18 WITNESS: Right; but this is the reassignment list.

19 JUDGE RODWELL: Okay. And the selectee and Mr.
20 Johnson are on that list; is that correct?

21 WITNESS: Yes; they are both on the list.

22 JUDGE RODWELL: And what does that mean, that both of
23 them are on this list?

24 WITNESS: Both of them are qualified and should be
25 considered for reassignment to the position.

1 JUDGE RODWELL: So when this list gets to the
2 Selecting Official, they are deemed both -- all of the
3 candidates on the list are deemed qualified in ...

4 WITNESS: Correct.

5 JUDGE RODWELL: ... for the position? Okay. Thank
6 you.

7 Okay. And so we really need to move on, because
8 what this case is about is Mr. Johnson and the other
9 candidates on this list were referred to the Selecting
10 Official. The Selecting Official made the decision then of
11 all of these qualified candidates whom she felt was best
12 qualified for the position, based on her knowledge of the
13 position. I don't -- generally, that's how it's done.
14 That's what is expected when the list is sent to the
15 Selecting Official.

16 MR. DUMAS: I understand, and I just need to ask two
17 more questions.

18 JUDGE RODWELL: Mr. Kent did not select the candidates
19 -- the selectee.

20 Q Mr. Kent, insofar as the form you just signed
21 when you -- are you familiar with this -- is there a
22 procedure called promotion?

23 JUDGE RODWELL: What are we getting at here? This is
24 the reassignment eligible form.

25 MR. DUMAS: Mr. Kent mentioned that this form is for

1 promotion.

2 JUDGE RODWELL: For reassignments. He did not say
3 that. This is reassignment eligible form. The one --
4 these are the individuals who are all in a current position
5 when they applied for this position. They were WG-2
6 employees; so they were eligible for reassignment, and this
7 is what happened in this list.

8 MR. DUMAS: I was going to ask Mr. Kent to discuss
9 reassignment and what's the qualification for reassignment.

10 MR. PERILLO: Your, Honor, ...

11 JUDGE RODWELL: What do you mean, "qualification for
12 reassignment"?

13 MR. DUMAS: In a situation of reassignment, it's our
14 contention, according to the record -- to what we have
15 here, ...

16 JUDGE RODWELL: Okay.

17 MR. DUMAS: ... that reassignment is decided by EO --
18 entrance on duty at the Lebanon VA. And their document in
19 the record indicates that.

20 MR. PERILLO: Is that a question?

21 JUDGE RODWELL: Go on; what -- what are you asking Mr.
22 Kent?

23 Q In reassignments, Mr. Kent, what are the basic
24 qualifications for reassignment, according to the policy of
25 the Lebanon VA?

1 A Minimum -- there's difference between minimum
2 qualifications and others. Minimum qualifications are you
3 must be the same grade and meet the basic qualifications of
4 that type of position. For instance, in this case, they
5 were probably Food Service workers and Housekeeping Aides
6 on there, because they could both be WG-2's.
7 Theoretically, a Laundry Worker could also be a WG-2 and be
8 on this type of register; and the would all meet basic
9 qualifications because in all three of those occupations,
10 part of their assignment is to clean.

11 Q Mr. Kent, there are two individuals -- same title
12 -- same job -- doing the same job; and one has been an ELD
13 for five years; one has been for one year. In a
14 reassignment, who is entitled to the position, Mr. Kent?

15 A Anyone the Selecting Official chooses to select.

16 Q Mr. Kent, is that written anywhere?

17 A It's -- it's right in the Union contract that
18 you're sitting there with. It says reassignments are an
19 exception to the Merit Promotion Policy.

20 Q Okay. Mr. Kent, I'd like to -- it looks like C-4
21 -- someone help me out here -- this is kinda -- the last --
22 the very last third -- fourth page from the last on the
23 Investigative Report, ...

24 JUDGE RODWELL: Is that a letter to Lena Mitchell?

25 MR. DUMAS: No; that's State's Seniority

1 Determination.

2 JUDGE RODWELL: Okay. This is C-4?

3 MR. DUMAS: The last section -- the last section of
4 the folder, the first page -- it will be C-6 -- C-6.

5 JUDGE RODWELL: Memorandum of Understanding, Seniority
6 Determinations?

7 MR. DUMAS: Yes.

8 JUDGE RODWELL: Is that what you're looking at?

9 MR. DUMAS: Yes.

10 Q Mr. Kent, what does that document indicate?

11 A That document indicates when you are using
12 seniority for a reassignment decision, you will use this
13 definition of seniority.

14 Q Mr. Kent, will you read the first sentence.

15 A The parties agree that the determination of
16 seniority, when used in reassignment decision, whether for
17 the most or least senior, will follow -- definition will
18 apply.

19 JUDGE RODWELL: It says, "When used." It doesn't say
20 it must be used. It says, "The parties agree that the
21 determination of seniority, when used in reassignment
22 decisions, whether for the most or least senior, the
23 following definition will apply."

24 Now was seniority used as a basis for making this
25 selection, to your knowledge?

1 WITNESS: No.

2 JUDGE RODWELL: Who -- who determines whether
3 seniority will be used?

4 WITNESS: It's basically a Management decision. This
5 document was designed and negotiated by myself and the
6 Union President to assist in assigning people who were
7 being displaced prior to a RIFF, to positions, rather than
8 otherwise announce them and block chances for retreat for
9 those people without being RIFF'd.

10 JUDGE RODWELL: And when you have a vacancy
11 announcement -- and this position was done through a
12 vacancy announcement, giving individuals an opportunity to
13 compete for the job; is that correct?

14 WITNESS: Yes.

15 JUDGE RODWELL: And would you normally use seniority
16 as a factor when making those selections in that case?

17 WITNESS: May or may not be a factor.

18 JUDGE RODWELL: How would it be a factor?

19 WITNESS: For instance, if you had two people that
20 were equally qualified, then the Selecting Official, they
21 may use that as a tie-breaker. In fact, this is in several
22 places in our Contract used as a tie breaker.

23 JUDGE RODWELL: So does that mean if a Selecting
24 Official, in his or her mind, can't determine who would be
25 the best qualified, or she has two people or three people

1 who are at the same level, ...

2 WITNESS: Relatively equal.

3 JUDGE RODWELL: ... and that person has a hard time
4 making up his or her mind, it may -- could break the tie?

5 WITNESS: We would recommend that would be the desired
6 type of tie-breaker that would be used.

7 JUDGE RODWELL: Okay. So. ...

8 MR. DUMAS: No more questions.

9 JUDGE RODWELL: Okay. Thank you. Do you have any
10 questions for Mr. Kent, Mr. Perillo?

11 CROSS-EXAMINATION

12 BY MR. PERILLO:

13 Q The list of eligibles was based upon individuals
14 that fit the requirements contained in the Position
15 Description; correct?

16 A Yes.

17 MR. PERILLO: No further questions.

18 JUDGE RODWELL: Okay. Are we done with Mr. Kent?

19 MR. DUMAS: Yes.

20 JUDGE RODWELL: Mr. Kent, I'm going to direct that you
21 not discuss your questions or the testimony with anyone
22 outside of this hearing room. And thank you; you may be
23 excused.

24 WITNESS: Thank you.

25 MR. PERILLO: Sir, you wanted Mr. ...

1 MR. DUMAS: Mr. Houck.

2 MR. PERILLO: ... Mr. Houck next.

3 Off the record?

4 JUDGE RODWELL: Off the record; Yes.

5 (Off the record.)

6 (On the record.)

7 JUDGE RODWELL: Back on the record. Good morning, Mr.
8 Houck?

9 WITNESS: Yes.

10 JUDGE RODWELL: That's correct? Sir, you've been
11 approved as a witness to testify in this hearing, and I am
12 Donna Rodwell, the Administrative Judge presiding over the
13 hearing. Do you have an objection, sir, to taking an oath
14 -- to being sworn in to testify?

15 WITNESS: No.

16 Whereupon,

17 RANDALL L. HOUCK
18 having been first duly sworn, was called as a witness
19 herein and was examined and testified as follows:

20 JUDGE RODWELL: Thank you, sir. State your full name
21 for the record, please.

22 WITNESS: It s Randall L. Houck.

23 JUDGE RODWELL: Okay. And is that H O U C K?

24 WITNESS: That's correct.

25 JUDGE RODWELL: And Randall with two L's?

1 WITNESS: That's correct.

2 JUDGE RODWELL: Okay. Thank you, sir. I am going to
3 let the Complainant, Mr. Johnson's, Representative, Mr.
4 Dumas question you; and after that, Mr. Perillo, the
5 Agency's representative may have some questions for you as
6 well; and I may have questions, too, at some point and
7 time.

8 Mr. Dumas, you may proceed, sir.

9 DIRECT EXAMINATION

10 BY MR. DUMAS:

11 Q Good morning, Mr. Houck.

12 A Good morning.

13 Q Thank you for coming down this morning in the
14 rain and so forth. Mr. Houck, I m going to be extremely
15 brief. I have in front of me an Investigative Report; and
16 in that Investigative Report, there's an indication that
17 you was privy to a conversation between yourself, and I
18 believe it was Wanda Miller and Alice Fidler; and Ms.
19 Fidler is alleged to have made certain statements. Do you
20 recall that?

21 A I believe Wanda Miller was the other person
22 present; I m not sure.

23 Q How long have you known Ms. Fidler?

24 A Since 1990, I believe.

25 Q Do you have any animosity toward her?

1 A No.

2 Q You know, Mr. Houck, let me ask you this:

3 I do understand you had conversations with
4 someone regarding this particular matter, testifying, et
5 cetera, ...

6 MR. PERILLO: Objection. It s not a question, Judge.

7 Q Okay. Mr. Houck, did you discuss testifying in
8 this matter with anyone?

9 MR. PERILLO: Objection.

10 JUDGE RODWELL: Excuse me, what ...

11 MR. PERILLO: It's his witness.

12 JUDGE RODWELL: Okay. I'm going to overrule that
13 objection. I don't think that is leading. Answer the
14 question, please.

15 WITNESS: I'm not sure I understand the question.

16 JUDGE RODWELL: Okay. Can you explain.

17 Q Have you discussed the possibility of testifying
18 in any hearing, tribunal or any like entity about these
19 matters?

20 A Have I discussed testifying?

21 JUDGE RODWELL: Have you talked to anyone about your
22 coming here and testifying here today?

23 WITNESS: No; I have not.

24 JUDGE RODWELL: Okay. Go on.

25 Q Have (sic) anyone suggested that you were not to

1 testify about these matters?

2 A I was -- I was told by the Administration of
3 Lebanon VA, by the local Union that I should be present
4 here. I believe that's what you're searching for.

5 Q Yes. Mr. Houck, can you tell us the nature of
6 the conversation that you heard or that you were a party
7 to.

8 A When?

9 Q The conversation that's alluded to in your -- in
10 the Investigation regarding statements that's alleged to
11 have been made by Ms. Fidler regarding minorities or blacks
12 working on her floor.

13 A Discussion that I heard -- overheard -- was back
14 in the early '90's when I worked for Ms. Fidler. There was
15 a fellow that wanted to come from Housekeeping into
16 Nursing, and the comment I heard from Ms. Fidler was that
17 "We didn't want any more of them on this floor."

18 Q Mr. Houck, when you -- during that conversation,
19 did it come to your mind what the term "them" meant or
20 referred to?

21 A Do you want to know my opinion?

22 Q Yes; I do.

23 MR. PERILLO: Objection.

24 JUDGE RODWELL: Overruled.

25 A My opinion was that she meant this fellow's being

1 black; because he was black. That's the only thing I
2 gathered from it.

3 Q Mr. Houck, do you work in -- by -- according to
4 records, you worked for Ms. Fidler for maybe seven years in
5 the Housekeeping Unit?

6 A Yes; that s correct.

7 Q And this is where this person was trying to be
8 employed?

9 A Pardon me?

10 Q This black person you are referring to?

11 A Yes; he was in Housekeeping and was trying to get
12 into Nursing.

13 Q And this conversation that you overheard, it was
14 a loud conversation? Was it just a conversation in passing
15 -- or just a normal conversation -- words exchanged?

16 A This wasn't a conversation directed at me and
17 Wanda Miller.

18 Q Mr. Houck, a second statement that's indicated in
19 this Investigative Report refers to a situation where an
20 individual was told, "What you just stated is bordering on
21 discrimination." Do you recall that?

22 A Yes; I do.

23 Q Can you enlighten us, please?

24 A Ms. Fidler went to Peggy Cromer, who's in Nursing
25 Education to see about this fellow coming into Nursing; and

1 she was told by Ms. Peggy Kroomer that "You're about this
2 close to discriminating against this gentleman; so it's
3 best that you back off."

4 Q When you said, "she", who are you referring to?

5 A Ms. Fidler.

6 Q Mr. Houck, you indicated that this may have taken
7 place somewhere in the early '90's. Do you recall when in
8 the '90's?

9 A No; I don't remember.

10 Q What is '95 or '96; or you just don't remember at
11 this point?

12 A I really don't remember which -- which year it
13 was.

14 MR. DUMAS: Thank you, Mr. Houck. I have no more
15 questions of this witness.

16 JUDGE RODWELL: Mr. Perillo.

17 CROSS-EXAMINATION

18 BY MR. PERILLO:

19 Q To whom was this -- Mr. Dumas asked you a
20 question. To whom was this conversation directed at, where
21 you allegedly overheard this remark that Ms. Fidler made?

22 A We were in the Dayroom where the patients
23 congregate at, and she was leaning over a half-door, and
24 she was discussing this with me and Wanda Miller.

25 Q Discussing with who?

1 A Myself and Wanda Miller.

2 Q And who?

3 A Wand Miller who was an LPN on the floor at the
4 time.

5 Q She was -- she had -- so this remark was directed
6 to you?

7 A She was discussing it with us; yeah.

8 Q It wasn't eavesdropping?

9 A Oh, absolutely not.

10 MR. PERILLO: No further questions.

11 JUDGE RODWELL: I just have one question, Mr. Houck.
12 The second statement regarding Ms. Fidler going to Peggy
13 Cromer, -- that's C R O M E R, in Nursing Education. How
14 did you know about that discussion or conversation between
15 Ms. Cromer and Ms. Fidler?

16 WITNESS: We were in the lunchroom, and Alice came
17 back and told us what she had to say. That's the only way
18 I would have known.

19 JUDGE RODWELL: So Ms. Fidler came back and told you
20 what Ms. Cromer had told her?

21 WITNESS: I was in the lunchroom, but I can't say at
22 the time who else was in the lunchroom with me.

23 JUDGE RODWELL: So do you know whether or not Ms.
24 Fidler went to Ms. Cromer to discuss whether or not she had
25 to accept this person into her Unit?

1 WITNESS: That's what I got out of her conversation,
2 that -- the way she discussed it with us -- that she went
3 to see Peggy Cromer about this; and that's how she was
4 instructed to handle it.

5 JUDGE RODWELL: Now during the time that you worked
6 for Ms. Fidler, did you hear her make any more statements
7 regarding blacks or minorities?

8 WITNESS: Off the top of my head, I couldn't -- I
9 couldn't say that I have.

10 JUDGE RODWELL: Okay. Were there any blacks or
11 minorities in the Unit at that time, prior to this
12 gentlemen coming in?

13 WITNESS: Yes.

14 JUDGE RODWELL: Okay. Did the gentleman transfer into
15 the Unit?

16 WITNESS: Yes.

17 JUDGE RODWELL: Okay. If you know, were there any
18 more people of color, or black employees, who were
19 reassigned into Ms. Fidler's Unit after that? If you can
20 recall. It's not ...

21 WITNESS: During the time that I was with her for
22 seven years, I don't believe any more were brought in; no.
23 There were those who left.

24 JUDGE RODWELL: When did you stop working in the Unit
25 with Ms. Fidler?

1 WITNESS: I think it was 1997.

2 JUDGE RODWELL: So you were with her from the early
3 '90's to 1997?

4 WITNESS: That's correct.

5 JUDGE RODWELL: And you believe that this statement
6 that she made regarding the gentleman who wanted to
7 transfer to her Unit was made in the early '90's?

8 WITNESS: I believe that's correct.

9 JUDGE RODWELL: Okay. I don't have any other
10 questions. I will direct that you not discuss your
11 testimony or the questions with anyone outside this hearing
12 room.

13 WITNESS: Okay.

14 JUDGE RODWELL: Okay. Thank you, sir. You may be
15 excused.

16 WITNESS: Okay.

17 MR. PERILLO: Judge, just to verify, this gentleman
18 may leave the site; correct?

19 JUDGE RODWELL: Yes; you may leave, sir. Thank you.

20 MR. PERILLO: Thank you. He has independent
21 transportation.

22 JUDGE RODWELL: Okay. Off the record.

23 (Off the record.)

24 (On the record.)

25 JUDGE RODWELL: We can go back on the record. Okay.

1 We're beginning with the Agency's case now, and Mr. Perillo
2 waived his opening statement; and we have the first
3 witness.

4 Good morning, still, Ms. Kohr. I'm Donna
5 Rodwell, the Administrative Judge presiding over this
6 matter. You have been approved as a witness. Do you have
7 any objection to taking an oath, ma'am?

8 WITNESS: No; I don't.

9 Whereupon,

10 BARBARA ANN KOHR

11 having been first duly sworn, was called as a witness
12 herein and was examined and testified as follows:

13 JUDGE RODWELL: State your full name for the record,
14 and spell it, please.

15 WITNESS: Barbara Ann Kohr; B A R B A R A, A N N,
16 K O H R.

17 JUDGE RODWELL: Okay. Ms. Kohr, Mr. Perillo, who
18 represents the Agency, will be starting off with his
19 questions on direct; and then Mr. Dumas, the Complainant,
20 Mr. Johnson's Representative, may have questions for you as
21 well. You may proceed, Mr. Perillo, please.

22 MR. PERILLO: Thank you, Judge.

23 DIRECT EXAMINATION

24 BY MR. PERILLO:

25 Q Good morning, Ms. Kohr.

1 A Good morning.

2 Q Has your position changed since the time you
3 spoke with the EEO Investigator concerning this Complaint?

4 A No; it has not.

5 Q What was your involvement with the selection of
6 the Housekeeping Aide position for which Mr. Johnson and
7 Mr. Ronald Hall were the finalists?

8 A I sat with Alice Fidler and did the selection --
9 helped with the selection.

10 MR. PERILLO: Thank you very much. No further
11 questions.

12 JUDGE RODWELL: Mr. Dumas?

13 MR. DUMAS: Thank you.

14 CROSS-EXAMINATION

15 BY MR. DUMAS:

16 Q Good morning, Ms. Kohr. Ms. Kohr, did you make
17 any recommendations to Ms. Fidler in any form or fashion?

18 A No; I did not.

19 Q You just merely sat with her and watched her as
20 she did these things?

21 A No; we used the supplemental and the KSAO and the
22 policy procedure for selecting employees; but I didn't make
23 any recommendations.

24 MR. DUMAS: Thank you. I have no further questions.

25 JUDGE RODWELL: Ms. Kohr, I just have one question.

1 What did you do? I mean what was your purpose for being
2 there?

3 WITNESS: Generally, we have at least two people sit
4 in on selection of employees; and what we do is review the
5 KSAO, the Supplement from the Employee, and base the
6 position on those standards that we use.

7 JUDGE RODWELL: And how do you do that? How did you
8 do that?

9 WITNESS: There's a scoring -- an established scoring,
10 like the KSAO's, there's a zero to five in those; zero,
11 being you cannot -- or you don't know anything about the
12 position, so you can't evaluate the employee; up to a five
13 being exceptional, and three being average. And these are
14 done by the Supervisor of the employee; and then they re
15 turned in; and then the employee also does a Supplemental
16 and tells what he knows about the job, what his past
17 experience is; and we use those.

18 JUDGE RODWELL: How did you divide up the candidates?
19 How did you assist Ms. Fidler?

20 WITNESS: Okay. We had both records, and we looked at
21 them both, and used the scoring as I just described to you
22 to make our selection.

23 JUDGE RODWELL: You mean the zero to five?

24 WITNESS: The zero to five for the KSAO, and one to
25 five for the Supplement.

1 JUDGE RODWELL: Now you said the Supervisors did the
2 scoring?

3 WITNESS: The Supervisors did the scoring on the
4 KSAO's, and they turned that into Human Resources; and
5 they, in turn, give it to the people that are making the
6 selection.

7 JUDGE RODWELL: And did you use the Supervisor's score
8 for the KSAO?

9 WITNESS: Yes; we did.

10 JUDGE RODWELL: Okay. So your scoring or rating came
11 in with the Supplemental ...

12 WITNESS: Correct.

13 JUDGE RODWELL: ... from the -- which was also based
14 on the KSAO's?

15 WITNESS: No; they're on the employee's -- there are
16 certain questions that are asked on the record that the
17 employee has, and they answer those questions and submit it
18 along with the KSAO.

19 JUDGE RODWELL: Okay. What is the KSAO?

20 WITNESS: The KSAO asks questions that are related to
21 the job that is being applied for?

22 JUDGE RODWELL: What does KSAO mean, for the record;
23 do you know that?

24 (No response.)

25 JUDGE RODWELL: Knowledge Skills and Abilities?

1 MR. DUMAS: Yeah; knowledge skills and abilities and
2 standards.

3 JUDGE RODWELL: Okay. And that's the part the
4 Supervisors fill out?

5 WITNESS: Correct.

6 JUDGE RODWELL: And the Supplemental information ...

7 WITNESS: Is done by the employee.

8 JUDGE RODWELL: And that's the part that you and Ms.
9 Fidler scored?

10 WITNESS: That's correct; and used scoring one to
11 five, which is what we always do.

12 JUDGE RODWELL: Okay. So you looked at the
13 information from the employee and scored one to five?

14 WITNESS: That s correct.

15 JUDGE RODWELL: Then how did you come up with a
16 decision?

17 WITNESS: They both -- both employees had the same
18 score for the KSAO. I believe it was a nine. Then on the
19 Supplemental, Mr. Hall had 17 years prior experience, and
20 also had experience with working with MSDS; and we scored
21 him one extra point for that. We also -- both these
22 employees had worked for Mrs. Fidler on a float basis in
23 the past, and Mr. Hall got an additional point in that
24 rating, also; so I think the final score was 19 to 17, if I
25 remember.

1 JUDGE RODWELL: When you say that he got an additional
2 point in that rating; what do you mean?

3 WITNESS: According to Mrs. Fidler, the experience on
4 the Unit and the cooperation and work performance of Mr.
5 Hall was -- and cooperation with staff was a little higher
6 than ...

7 JUDGE RODWELL: Than Mr. Johnson's?

8 WITNESS: ... than Mr. Johnson's.

9 JUDGE RODWELL: Okay. And that was based on her ...

10 WITNESS: Observations; correct.

11 JUDGE RODWELL: Okay. Who made the decision to
12 consider experience with MSDS?

13 WITNESS: That is part of the job. You have to have a
14 knowledge of materials and safety for this position;
15 because the employee needs to work with various chemicals,
16 cleaning, during spillage, et cetera; so they do have to
17 have a knowledge of that; and Mr. Hall taught this in the
18 Service and did set up a program. And he stated that in
19 his Supplemental.

20 JUDGE RODWELL: When you say that that's a part of the
21 job, ...

22 WITNESS: Uh, huh.

23 JUDGE RODWELL: ... is that written anywhere, or is it
24 just a part of the day-to-day duties of the job?

25 WITNESS: I'm not positive if it ...

1 JUDGE RODWELL: Would Ms. ...

2 WITNESS: I believe that is in part of their job
3 description. They have to have a knowledge -- they have to
4 know where the sheets are and the information that's on
5 them; what to do in case of spillage; what chemicals not to
6 mix; what the effects would be from the different chemicals
7 that are used.

8 I couldn't tell you what paper it's written on,
9 though.

10 JUDGE RODWELL: Okay. Now that information that gives
11 -- strike that.

12 Is that information actually written down,
13 explaining what the different chemicals are, and the
14 effects of the different chemicals; and what chemicals
15 should and shouldn't be mixed with each other? Is that
16 written?

17 WITNESS: Yes; it is.

18 JUDGE RODWELL: So is the requirement that the
19 employees know this information or that they be able to
20 read the information?

21 WITNESS: I think basic -- basic, they should know,
22 and some they should be able to read. On a day-by-day
23 basis, there's certain chemicals you should know, if you're
24 using it everyday. And the others, as long as you know
25 where the data sheets are and what to do, ...

1 JUDGE RODWELL: What exactly is it that Mr. Hall set
2 up?

3 WITNESS: He set up the program in the military and
4 taught the MSDS Program.

5 JUDGE RODWELL: Now did you and Ms. Fidler interview
6 any of these individuals?

7 WITNESS: No; we did not.

8 JUDGE RODWELL: Okay. I don't have any other
9 questions. Does anyone else have any questions for Ms.
10 Kohr?

11 REDIRECT EXAMINATION

12 BY MR. PERILLO:

13 Q In response to Judge Rodwell's question, you did
14 indicate that Mr. Hall objectively garnered 19 points to
15 Mr. Johnson's 17 in your formal tally; is that correct?

16 A That's correct.

17 MR. PERILLO: No further questions. Thank you.

18 RECROSS-EXAMINATION

19 BY MR. DUMAS:

20 Q Yes; two questions. Insofar as the MSDS
21 paperwork, who made the decision that, "I want him because
22 he has 17 years of training in setting up a program?

23 A No; he had 17 years of experience doing
24 housekeeping.

25 Q Seventeen?

1 A Seventeen years in the military, experience;
2 according to his Supplement. And in addition to that, he
3 had the MSDS. And both these facts, we felt gave him an
4 additional point.

5 Q And you read that and concurred with that?

6 A Yes; I concurred with that.

7 JUDGE RODWELL: What do you mean, "Read it and
8 concurred with it?" She's testifying to it.

9 MR. DUMAS: I'm just -- of course, I will mention that
10 document later on.

11 JUDGE RODWELL: But -- okay. You mean that you read
12 his -- you're talking about Mr. Hall's qualifications that
13 they read?

14 MR. DUMAS: Yes. Okay.

15 Thank you.

16 WITNESS: You're welcome.

17 JUDGE RODWELL: Wait one moment, Ms. Kohr. We are
18 finished, but I'm going to direct that you not discuss your
19 testimony or the questions asked with anyone outside this
20 hearing room, please.

21 WITNESS: Okay.

22 JUDGE RODWELL: Okay. You may be excused, and thank
23 you.

24 Off the record.

25 (Off the record.)

1 (On the record.)

2 JUDGE RODWELL: Back on the record, please. Good
3 morning. We still have a couple minutes of morning left,
4 Ms. Fidler.

5 WITNESS: Yes.

6 JUDGE RODWELL: I m Administrative Judge Donna
7 Rodwell, presiding over the hearing today, and you have
8 been approved as a witness in this matter regarding Mr.
9 Lewis Johnson.

10 Do you have an objection to taking an oath,
11 ma' am?

12 WITNESS: No; I don' t.

13 Whereupon,

14 ALICE ELIZABETH FIDLER

15 having been first duly sworn, was called as a witness
16 herein and was examined and testified as follows:

17 JUDGE RODWELL: Ms. Fidler, I'm going to ask you to
18 state your name for the record, and spell it, please.

19 WITNESS: Alice Elizabeth Fidler, A L I C E,
20 E L I Z A B E T H, F I D L E R.

21 JUDGE RODWELL: Okay. Ms. Fidler, I am going to let
22 Mr. Perillo, the Agency Representative, begin with his
23 direct examination. After that, Mr. Dumas, the
24 Complainant, Mr. Johnson's Representative, may have some
25 questions as you -- for you, rather, as well. Mr. Perillo.

1 MR. PERILLO: Thank you, Judge. Good morning, Ms.
2 Fidler.

3 WITNESS: Good morning.

4 DIRECT EXAMINATION

5 BY MR. PERILLO:

6 Q Calling your attention to July 17, 1998, do you
7 recall making a selection of a gentleman, Ronald Hall, for
8 a Housekeeping Aide position?

9 A Yes; I do.

10 Q Has your position changed since that particular
11 date?

12 A Has my position changed?

13 Q Yes.

14 A No; it has not.

15 Q Calling your attention to some period in the
16 early '90's, did you have an employee by the name of Ronald
17 Houck working for you?

18 A Randall Houck.

19 Q Randall Houck; pardon me.

20 A Yes.

21 Q Do you recall an incident where you made a remark
22 that could appear to be considered racist?

23 A No; I do not.

24 Q Do you recall a situation where an individual in
25 the early '90's came to you and mentioned that a certain

1 remark verged on discriminatory?

2 A No; I don't.

3 Q Calling your attention to the selection process
4 for the Housekeeping Aide position we had just discussed,
5 who are the two finalists for the position to the selection
6 of Housekeeping Aide?

7 A Lewis Johnson and Ronald Hall.

8 Q Lewis Johnson is the gentleman sitting on your
9 left?

10 A That's correct.

11 Q Did you make this rating decision for the
12 finalist in conjunction with a Ms. Barbara Kohr?

13 A Yes; I did.

14 Q Okay. Do you happen to recall the tally of the
15 scores of the two finalists, from an objective standpoint,
16 numerically?

17 A I think it was 17 and 19, the totals.

18 Q And who had the higher score, numerically?

19 A Mr. Hall.

20 Q And he was selected?

21 A He was selected.

22 Q Okay. Now why was Mr. Hall -- and Mr. Hall is a
23 white, Caucasian male; is that correct?

24 A This is correct.

25 Q Selected over Mr. Johnson, and he is an African-

1 American gentleman?

2 A Mr. Hall's documentation on what he had written
3 for his qualifications ...

4 Q What do you mean by documentation; what documents
5 are called?

6 A Each employee does a Supplemental of why they
7 want the position, and why they think they re qualified;
8 and their Supervisor does also, a form.

9 Q On the Supervisor forms, is it correct that they
10 were equal scores, Mr. Johnson and Mr. Hall?

11 A Yes; they were exactly the same.

12 Q So then your objective evaluation criteria is
13 based on the Supplemental?

14 A Supplemental by the employee. And Mr. Hall
15 stated in his that he had 17 years experience in the Air
16 Force, cleaning buildings and that he was in charge of
17 setting up and teaching the MSDS, which is the Material
18 Safety Data Sheets.

19 JUDGE RODWELL: Could you just explain for the record,
20 briefly, what Material Safety Data Sheets are, Ms. ...

21 WITNESS: It will tell you what components are in a
22 product and if it can be mixed with something else; or if
23 it gets in your eyes, what you need to do with this type of
24 -- or if you have to call Poison Control or whatever.

25 Q Were interviews conducted for the position of the

1 -- with the final candidates?

2 A No.

3 Q Why not?

4 A It is the policy that if you interview one, you
5 have to interview everybody. Mrs. Kohr and I have (sic)
6 looked over the qualifications and decided we could make a
7 selection without interviewing the candidates.

8 MR. PERILLO: No further questions.

9 JUDGE RODWELL: Okay. Mr. Dumas, you may proceed with
10 the evidence.

11 CROSS-EXAMINATION

12 BY MR. DUMAS:

13 Q Good morning, Ms. Fidler.

14 A Good morning.

15 Q Ms. Fidler, first I want to ask you, this MSDS --
16 is there a MSDS procedure specific to the VA hospital?

17 A Yes.

18 Q Knowing anything about MSDS, then, you would
19 concur, or perhaps not, that there is a MSDS data sheet
20 specific to the Air Force -- they are not the same entity?

21 A But each Government -- we have an MSDS book on
22 every Unit for all the products that are used on the Unit,
23 and many of the products are housekeeping-type products,
24 like Clorox, you know, cleaning supplies and things like
25 this.

1 Q But an MSDS for the Air Force ...

2 A But I -- if he was dealing with cleaning in the
3 Air Force, he was probably using some of the same cleaning
4 agents that we use in the Medical Center. My concern was
5 that he would be knowledgeable about certain cleaning
6 compounds.

7 Q I see. Ms. Fidler, where do you -- where do you
8 -- where did you pick up the idea -- and I apologize if
9 it's not coming out correct -- I'm not trying to be
10 facetious or anything -- but where did you get the idea
11 that Mr. Hall used or was involved in MSDS in a cleaning
12 capacity in the military?

13 A Because of what he had written on his
14 Supplemental.

15 MR. DUMAS: May I just ...

16 JUDGE RODWELL: Yes.

17 Q Now Ms. Fidler, ...

18 JUDGE RODWELL: Where -- what are you getting at?

19 MR. DUMAS: Mr. Hall -- the first page of Mr. Hall's
20 Supplemental Qualification Statement.

21 JUDGE RODWELL: I'm going to go off the record for a
22 moment.

23 (Off the record.)

24 (On the record.)

25 JUDGE RODWELL: We can go back on the record.

1 This is in C-3, and going down to Mr. Hall's
2 Supplemental.

3 MR. DUMAS: Ten of 13.

4 JUDGE RODWELL: Okay. Page 10 of 13?

5 MR. DUMAS: Yes.

6 JUDGE RODWELL: Thank you.

7 Q I'd like for you to read the first sentence --
8 and it may be something wrong here. Start with the
9 beginning of the first sentence, please.

10 A "Having served 17 years as an enlisted person, I
11 was assigned a lot of cleaning jobs in buildings for the
12 U. S. Air Force as a Training System Technician. I had to
13 set up and control the MSDS Training Program for the DCM
14 Staff and Maintenance Squadron."

15 Q Okay. Ms. Fidler, what I would like for you to
16 do; see this period here? I'd like you to read from here
17 to here, please.

18 A "Having served 17 years as an enlisted person, I
19 was assigned a lot of cleaning jobs in the buildings for
20 the U. S. Air Force."

21 Q Ms. Fidler, reading that, does that tell you Mr.
22 Hall was doing housekeeping work in the military; or did he
23 periodic (sic) or during his 17-period that he was there --
24 he cleaned buildings.

25 A When you clean buildings, you use housekeeping

1 materials.

2 Q Yes; you do.

3 Ms. Fidler, will you read the second sentence,
4 please.

5 A "As a Training Systems Technician, I had to set
6 up and control the MSDS Training Program for the DCM Staff
7 and Maintenance Squadron under us."

8 Q Now Ms. Fidler, where in that sentence is it
9 alluded to or does it state that Mr. Hall was doing MSDS in
10 a cleaning capacity in the military?

11 A The MSDS that he's talking about pertains to the
12 cleaning area of the buildings.

13 Q Ms. Fidler, did you discuss this matter with Mr.
14 Hall, perhaps?

15 A No; I did not.

16 Q At any point at all?

17 A No.

18 Q So you are making that assumption?

19 A I took it from what was written here.

20 Q Thank you.

21 Ms. Fidler, do you have any experience with MSDS
22 in any area other than the VA?

23 A No other area than the VA.

24 Q So everything you know, MSDS Chemicals, is from
25 the Lebanon VA program?

1 A Or what you use at home, you know. You have
2 Clorox, and you don't mix it with something else.

3 Q Yes; I understand.

4 So perhaps, it's your belief that MSDS only
5 pertained to cleaning solutions?

6 A No; and I have worked elsewhere where we had
7 MSDS, and it applies to everything in the building. You
8 know, Nursing has supplies for MSDS, and that we make sure
9 that we know what's in these solutions we're using.

10 Q If I said MSDS in the military is used on a
11 gunnery range, would you agree with me or would you say ...

12 A I wouldn't have a clue.

13 Q If I said MSDS ...

14 JUDGE RODWELL: Okay. You need to move on, please.
15 The witness has testified that she based on the
16 Supplemental Qualifications Statement, and what Mr. Hall
17 has written.

18 Q Ms. Fidler, do you recall ever hiring any blacks
19 in your Unit since say perhaps 1990 -- I know that's going
20 back pretty far -- Housekeeping or Nursing or anything like
21 that?

22 A Yes; I have.

23 Q Do you recall the approximate period ...

24 A I just hired an LPN -- an African-American LPN.

25 Q Okay. Let's go back a bit further. Let's say

1 1995, '94, '93.

2 A During those years, I did not make the selection
3 for the employees that were assigned to my Unit. They were
4 picked by a Nursing Recruiter or Personnel or whoever, and
5 they were just assigned to the Unit.

6 Q Ms. Fidler, at the time of this hire, did you
7 read or did you brief yourself on the qualification of a
8 Housekeeper?

9 A Yes.

10 Q So you well know exactly what qualification (sic)
11 were?

12 (No audible response.)

13 Q Mr. Fidler, in your statements in the
14 investigation, you indicated what you felt -- the question
15 was asked, "Do you know the requirement (sic) for the
16 position of Housekeeper?" You answered that question. Can
17 you answer that question here for us?

18 A The requirements for a Housekeeper?

19 Q Yes.

20 MR. PERILLO: Objection. We've already stipulated
21 through other testimony that ...

22 JUDGE RODWELL: I m going to overrule. Let her answer
23 the question. Go on and answer the question.

24 A You have to be able to keep the area clean. You
25 need to know what kind of cleaning materials you're going

1 to be able to use. You have to have safety standards, you
2 know, to make sure you put up signs. You need to work with
3 other people; if you need help to do something, you know,
4 that's going to take more than one person. You need
5 infection control education so you know how to clean a Unit
6 that may have been contaminated.

7 The ultimate goal of the Housekeeping person is
8 to keep the Unit clean.

9 Q Thank you.

10 Ms. Fidler, can you tell us what procedure that
11 you used to decide between Johnson and Mr. Hall, and I
12 believe those were the remaining candidates?

13 A That's correct.

14 Q What procedure did you use to decide to hire Mr.
15 Hall over Mr. Johnson?

16 A Mrs. Kohr and I reviewed, as I said previously,
17 the KSAO's and the Supplemental the employees had written;
18 and we made a choice on the numbers we had come up with,
19 the 17 and the 19. We chose the person that was 19.

20 Q I think I may have lost something. I heard
21 KSOA's and Supplemental?

22 A KSAO is the ...

23 JUDGE RODWELL: We know what that is. Go on. I'm
24 just saying we already know what that is.

25 MR. DUMAS: Yes.

1 Q I heard KSOA's and Supplemental.

2 A And the employees' Supplemental.

3 Q And was there anything else?

4 A And observation of their work on the Unit -- or
5 in the areas.

6 Q All right -- okay; I understand that you used
7 observation. Did you observe Mr. Hall?

8 A Yes.

9 Q Can you tell us what period of time you observed
10 Mr. Hall?

11 A Approximately for a night. Two years ago --
12 time's a little mixed up. I think he was on the Unit four
13 to six weeks prior to the job being filled. He was in
14 there as a temporary person.

15 Q And Ms. Fidler, what days of the week, to your
16 best recollection, did Mr. Hall work?

17 A He worked Monday through Friday when he was doing
18 the temporary -- when he was assigned that Unit.

19 Q Okay. I apologize. Ms. Fidler, let's go back in
20 time. Now I'm not referring to most recent; I'm referring
21 to the specific time in question here; let's go to when
22 they -- when the paperwork was submitted for the jobs, and
23 you made the hire. That would have been about -- you made
24 the hire about ...

25 JUDGE RODWELL: What is the question? Get to the

1 question.

2 Q The question -- the question is this:

3 When did Mr. Hall -- what period did Mr. Hall
4 work -- what days of the week did Mr. Hall work?

5 JUDGE RODWELL: Monday through Friday was her answer,
6 approximately four to six weeks, when he worked on the Unit
7 temporarily assigned to that Unit, prior to the job being
8 filled. That was her answer. It was asked, and it was
9 answered.

10 Q Ms. Fidler, did Mr. Johnson -- correction, did
11 Mr. Hall work on your Unit in June of 1998?

12 A Yes.

13 Q Did Mr. -- did Mr. -- did Mr. Hall work on your
14 Unit as a part-timer?

15 A He was a full-time employee at that time, if I
16 recollect correctly.

17 Q My question, ma'am, did Mr. Hall work on your
18 Unit as a part-timer?

19 A No; a full-timer during June.

20 Q Ma'am, I'm going to ask you the question again.

21 JUDGE RODWELL: She answered the question, Mr. Dumas.
22 Come on, now.

23 MR. DUMAS: Ma'am -- ma'am ...

24 JUDGE RODWELL: You know, I'm getting really impatient
25 with this, ...

1 MR. DUMAS: I under ...

2 JUDGE RODWELL: ... it makes it -- it has nothing to
3 do with whether you're a lawyer or not.

4 MR. DUMAS: I understand.

5 JUDGE RODWELL: It has to do with listening to the
6 answers.

7 Q Okay. Ms. Fidler, can ...

8 JUDGE RODWELL: It doesn't -- you may not like her
9 answer, but -- or agree with her answer, but we're not here
10 to argue over the answers. We're here for you to ask the
11 questions and get the answers.

12 Q Ms. Fidler, I'd like to take ...

13 JUDGE RODWELL: I mean this is -- this is ...

14 Q Ms. Fidler, I'd like to take you back to your
15 statements in the Investigative Report here. That's going
16 to be -- Investigative Report, here ...

17 JUDGE RODWELL: It's under B-5.

18 MR. DUMAS: Okay. That's going to be on Page 7, Ms.
19 Fidler's statements.

20 JUDGE RODWELL: Okay.

21 MR. DUMAS: At Line 13.

22 MR. PERILLO: Stipulate it says what it says. It's
23 part of the record.

24 MR. DUMAS: I appreciate that, but I'd like her to ...

25 JUDGE RODWELL: I don't want her to read it. If you

1 have a question, you can ask her. I can read.

2 MR. DUMAS: Okay.

3 Q Ms. Fidler, do you recall being asked the
4 question, during your deposition, as to how long Mr. Hall
5 was signed on to your Unit?

6 A No; I don't recall. That was two years ago.

7 Q Ms. Fidler, ...

8 JUDGE RODWELL: She answered the question, she does
9 not recall. Move on to the next question.

10 MR. DUMAS: Okay.

11 Q Ms. Fidler, do you work on weekends?

12 A No.

13 Q Ms. Fidler, did you observe Mr. Hall on weekends
14 as a worker?

15 A I observed him during the week as a worker.

16 Q During the week? Did you observe Mr. Johnson
17 during the week, Ms. Fidler?

18 A Yes.

19 Q Do you recall what period of time?

20 A Approximately I would say four weeks -- four to
21 six.

22 Q Ms. Fidler, when you hired Mr. Hall, did you have
23 available to you his records?

24 A What records?

25 Q Personnel records?

1 A No.

2 JUDGE RODWELL: Excuse me, Ms. Fidler, did you -- did
3 you testify that you also observed Mr. Johnson for about
4 four to six weeks as well?

5 WITNESS: I think it was approximately that length of
6 time.

7 JUDGE RODWELL: And what time period would that have
8 been?

9 WITNESS: I'm not sure; maybe from February to June.
10 He was detailed to our Product Line to help with coverage
11 and to help with project cleaning.

12 MR. DUMAS: Judge, I have no other questions of this
13 witness.

14 MR. PERILLO: A couple of redirect, Judge.

15 JUDGE RODWELL: Okay. Go on, Mr. ...

16 REDIRECT EXAMINATION

17 BY MR. PERILLO:

18 Q Did you speak to Mr. Johnson post-selection with
19 regard to answering his question regarding why he was not
20 selected?

21 A He came to my office one day to see me, and he
22 said to me, "Alice, can I speak to you off the cuff?" And
23 I said he could.

24 Q What happened?

25 A And he asked me why he wasn't selected, and I

1 told him at that time that I felt I had selected the best
2 qualified person.

3 Q Did you give him any reasons?

4 A No; not that I can recall.

5 MR. PERILLO: Okay. Nothing else. Thank you.

6 JUDGE RODWELL: Okay. Ms. Fidler, I have a couple of
7 -- a few questions myself.

8 You said that you also based your determination
9 on your observations of both Mr. Hall and Mr. Johnson's
10 work; is that correct?

11 WITNESS: That's correct.

12 JUDGE RODWELL: What was it about Mr. Hall's work that
13 you observed that made you determine that he was more
14 qualified than Mr. Johnson?

15 WITNESS: He found a curtain rod that had come loose
16 from the ceiling, and he went to the Secretary and told her
17 what room, and so forth; and went ahead and took care of
18 having it repaired, reported, without coming to me to okay
19 this; and I thought this was good observation.

20 JUDGE RODWELL: Is that the only thing about the
21 observation of the performance that made you determine that
22 one was more qualified than the other?

23 WITNESS: I also felt that Mr. -- this is a demented
24 Unit where we have patients that void in the waste cans,
25 you know, and smear feces on the wall and so forth. Mr.

1 Hall would clean it up and, you know, just realizing that
2 this was part of the job.

3 Mr. Johnson would always clean it up, but he
4 wanted the staff to try to retrain the patients; and most
5 of these patients, you cannot retrain or redirect.

6 JUDGE RODWELL: What about the -- regarding the use of
7 the MSDS and hazardous chemicals and cleaning chemicals?
8 Did you make observations about the use of those materials
9 and data sheets?

10 WITNESS: There was -- Lewis was doing Project
11 Cleaning at that time, and he was using wax stripper and
12 waxing the floors; and he used everything appropriately.

13 JUDGE RODWELL: Okay. So was your determination that
14 Mr. Hall was more qualified regarding the use of hazardous
15 materials or cleaning products based on what you read in
16 his employee statement solely, or based on that and your
17 personal observation?

18 WITNESS: Based on his -- what he had written and on
19 my personal observations. He was very careful to make sure
20 that his cart was not left in the hallway where patients
21 could get anything that would be dangerous to them. He
22 always locked his cart in the closet and didn't leave it in
23 the hall.

24 JUDGE RODWELL: You mean leaving it in the hall
25 unattended?

1 (No audible response.)

2 JUDGE RODWELL: Okay. Did you ever observe Mr.
3 Johnson leave his cart in the hall unattended?

4 WITNESS: He had a -- yes; Yes.

5 JUDGE RODWELL: What were you going to say -- he had a
6 ...

7 WITNESS: Well, he was waxing, and he had a much
8 larger cart, and it would have been more difficult for him
9 to try to push it into a closet. He would have had to
10 totally take it off the Unit.

11 JUDGE RODWELL: Okay.

12 WITNESS: He tried to secure it.

13 JUDGE RODWELL: Now the testimony is that -- in the
14 record -- I believe -- reflects that Mr. Hall received two
15 more points than Mr. Johnson; and -- and what were those
16 two additional points for, if you recall?

17 WITNESS: One was for the content of the Supplemental,
18 and the other one was for work observation.

19 JUDGE RODWELL: Are there any more questions for Ms.
20 Fidler?

21 MR. PERILLO: None.

22 MR. DUMAS: I have none.

23 JUDGE RODWELL: Okay. Ms. Fidler, I direct that you
24 not discuss your questions or the responses with anyone
25 outside this hearing room, and you may be excused. Thank

1 you.

2 WITNESS: Thank you.

3 JUDGE RODWELL: We may go off the record.

4 (Off the record.)

5 (On the record.)

6 JUDGE RODWELL: Back on the record. Okay. Mr.
7 Johnson wishes to make -- give testimony in rebuttal to the
8 Agency testimony, and I'm going to allow Mr. Johnson to do
9 that in this matter. Mr. Johnson, do you have any
10 objection to taking an oath?

11 WITNESS: No; I don't.

12 Whereupon,

13 LEWIS JOHNSON

14 having been first duly sworn, was called as a witness
15 herein and was examined and testified as follows:

16 JUDGE RODWELL: Okay. I'm going to ask you to speak
17 up a little bit and to turn the mike -- either sit in that
18 chair -- you can sit -- sit on the end. Okay. And Mr.
19 Johnson, you are Lewis Johnson?

20 WITNESS: Yes.

21 JUDGE RODWELL: The Complainant in this case?

22 WITNESS: Yes.

23 JUDGE RODWELL: And you may proceed.

24

25

DIRECT EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY MR. DUMAS:

Q Okay.

JUDGE RODWELL: And I am going to allow -- excuse me --
- Mr. Johnson, you're going to make a statement; right?
You re not going to be asked questions by Mr. Dumas? How -
- how do you want to do this? Do you want to just make a
statement, or do you want Mr. Dumas to ask you questions?

WITNESS: He can ask me questions.

JUDGE RODWELL: Okay.

MR. DUMAS: I think Mr. Johnson would like to make
that decision.

Q Mr. Johnson, how long have you worked for the VA
-- Lebanon VA?

A Lebanon VA Hospital, February, 1993.

Q What was your original capacity?

A Nursing Assistant.

Q And your second capacity?

A Housekeeping Aide.

Q Mr. Johnson, when you started at the VA as a
Housekeeper, were you given any training?

A Yes.

Q Were you trained in the use of chemicals? And if
so, would you explain.

A Yes; I was trained with the use of chemicals in

1 Nursing. There were certain chemicals we used in the
2 Nursing Unit, and there was -- what you would call the kind
3 of training -- we have the person that assist us -- we used
4 to call them a certain name -- anyway, we would work with
5 one person; they would train us, and we would fill out the
6 sheets of the stuff that we did and the chemicals we used;
7 and I was taught this particular stuff.

8 In Housekeeping, I was -- the Supervisor would
9 train -- was training me, and he would assign another
10 employee to train me, and we were working with particular
11 chemicals, and I was directed to know where -- was told
12 where the MSD forms were located.

13 JUDGE RODWELL: You were told where they were located?

14 WITNESS: I was told where they were located.

15 Q Mr. Johnson, was this training -- was this
16 training just for you? Is there some policy or procedures
17 on that?

18 A Well, it's required training coming into
19 Housekeeping. You didn't have to be a Housekeeper to be
20 trained how to learn how to do Housekeeping work, you know.
21 You was hired. They would train you in that position to do
22 that type of work.

23 Q I see. Mr. Johnson, when you -- you did, if I
24 recall, go to Alice Fidler ...

25 A Yes.

1 Q ... and discuss with her that you was not
2 selected? Was it mentioned to you that perhaps there might
3 be something else you might want, versus this position?

4 A Yes.

5 Q Were you interested in that position?

6 A No.

7 JUDGE RODWELL: What else -- go on -- no; go on. I'm
8 sorry; go on.

9 Q Mr. Johnson, from your experience at the Hospital
10 and the on-going situation as we sit here, is there a
11 policy, to your best knowledge, regarding reassignments and
12 seniority?

13 A Yes; I believe there's a policy of understanding.
14 There was an agreement between Management and the Union.

15 Q And what is that agreement, Mr. Johnson, if you
16 know?

17 A I can't recall it off the top of my head, but it
18 was based on time on the duty station; in reassignment
19 decisions and other kind of situations, that's off the top
20 of my head -- there's a policy there.

21 Q Mr. Johnson, -- I'm not going to ask you any more
22 questions.

23 JUDGE RODWELL: Mr. Perillo?

24 MR. PERILLO: Nothing; thank you.

25 WITNESS: Can I ...

1 JUDGE RODWELL: Yes.

2 WITNESS: ... have a statement? Well, according to
3 the way we applied for this job, they was asked the
4 question about our ability and knowledge about in the
5 KSOA's, and from -- well what I see he answered, he never
6 answered the questions in the KOSA s about the 17 years
7 experience. If you're on C-3 -- can I -- the one we was
8 referring to was him having 17 years. The question was
9 knowledge of proper cleaning procedures and proper use of
10 very -- of cleaning and sanitizing solutions.

11 Having served 17 years as an enlisted person
12 actually doesn't answer that question. If you've heard my
13 answer to the same question, in my testimony -- what page
14 is that on for me?

15 JUDGE RODWELL: I think it's Page 10 -- no; that's Mr.
16 Hall.

17 WITNESS: I answered the same question ...

18 JUDGE RODWELL: I'm sorry; what page is that?

19 WITNESS: It's 7 of 13.

20 In this same answer to that question, explains
21 the proper procedure of -- the knowledge of proper cleaning
22 procedures and proper use of various cleaning equipment.
23 His does not even go into any detail on that, but he had
24 scored higher on the KOSA for answering these questions.

25 And I answered the same questions -- the same as

1 his, and all the questions are being -- I answered them
2 according to the question I was asked, and his doesn't --
3 the first one doesn't even answer the question in which he
4 was actually graded on and basically given the higher
5 points for.

6 As far as working with Alice Fidler, I worked
7 with her from -- on the detail from January 5th to April
8 24th. The purpose of that detail was to see if a Floater
9 could perform the duties in that particular Product Line to
10 alleviate -- to see if it was possible for that to work
11 because of the -- because of the time off and everything,
12 and them calling over to EMS Department, calling for
13 people. In that capacity I worked for her -- I worked for
14 Ms. Fidler on a regular basis. I reported to her. She
15 observed my work. We coordinated time to schedule --
16 getting things done; coming in early.

17 When there was -- as a matter of fact, I worked
18 on five different Units of the Product Line of Extended
19 Care. When somebody would call up, it was my report there
20 and find out if someone was there and report it back to Ms.
21 Fidler.

22 When there was damages or something break (sic);
23 it was my responsibility to go ahead -- I did report
24 damages that needed to be repaired. I did have work orders
25 done on a regular basis, you know.

1 JUDGE RODWELL: Without going to Ms. Fidler?

2 WITNESS: Without going to Ms. Fidler. You know --
3 and a lot of times, you know, working in that particular
4 Unit, Ms. Fidler -- in that particular job, she actually
5 told me in our meeting that she had discussed that we had,
6 that I did do a good job, you know; and she told me -- when
7 I asked her the question, why I wasn't selected, she said,
8 "On paper, we were both equal, and she selected Mr. Hall
9 because he fit well with the team, and he works better with
10 the patients."

11 And with that, I decided that wasn't the criteria
12 for selecting the Housekeeper. Also, according to the
13 investigation, Ms. Fidler said she observed this gentleman.
14 This gentleman worked weekends, and she couldn't have
15 possibly have observed him during the week.

16 JUDGE RODWELL: It's your testimony that Mr. Hall did
17 not work during the week?

18 WITNESS: Maybe a week or two; something like four or
19 five months -- three or four months apart.

20 JUDGE RODWELL: How do you know that?

21 WITNESS: Because I worked out of EMS Department, and
22 we was all dispatched to different Units at the same time
23 in the EMS Department.

24 JUDGE RODWELL: Okay. What about when Mr. Hall left
25 the EMS Department and went to Extended Care on a full-time

1 basis?

2 WITNESS: Well, he worked -- he got hired June 7th.
3 Th posting of this job was June 10th. He was on full-time
4 for three days.

5 JUDGE RODWELL: That was the posting of the job.

6 WITNESS: The posting of the job -- well, we both
7 applied for the job on June 10th.

8 JUDGE RODWELL: The individual was selected on or
9 about -- according to the document, the Certification of
10 Position, dated July 8th, in the file under C-3, at the
11 bottom of that, there's a part where the Selecting Official
12 indicates who they selected; and that date is June 15,
13 1998; so that's over a month after he was hired into that
14 Unit.

15 WITNESS: Uh, huh.

16 JUDGE RODWELL: That is probably correct; Yes.

17 MR. DUMAS: May I have this?

18 JUDGE RODWELL: No; you may not.

19 MR. DUMAS: I just really need to correct you
20 something there.

21 JUDGE RODWELL: What do you need -- you don't need to
22 correct me on anything.

23 MR. DUMAS: I'm sorry; but ...

24 JUDGE RODWELL: But that -- if you have a question for
25 Mr. Johnson, you may ask him a question.

1 Q Mr. Johnson, according to the Personnel Action
2 Form that is part of the Investigation Report, when was Mr.
3 Johnson -- correction, when was ...

4 JUDGE RODWELL: Excuse me, sir; I know that. I have
5 the paper, and I know what's on that paper.

6 MR. DUMAS: Uh, huh.

7 JUDGE RODWELL: And that is what is -- I know what is
8 on that paper. The Personnel Action Form, the effective
9 date was June 7, 1998. The selection was made in July of
10 1998.

11 MR. DUMAS: The selection was ...

12 JUDGE RODWELL: This is based on the record; this is
13 ...

14 MR. DUMAS: The selection was made on July 15th. The
15 documents for the position went in and were signed on June
16 15th. And they made their decision on the documents from
17 June 15th; not what he was doing between that period.

18 JUDGE RODWELL: But sir, we need to go on; okay? I'm
19 actually doing what I shouldn't be doing, and that is
20 drawing conclusions; and I will do that -- I don't need you
21 -- I will do that. Because the record speaks for itself.

22 WITNESS: In essence, I felt that I may have been
23 discriminated against because I was black at the time when
24 she told me that, because I knew I had more time in; I had
25 more experience in Housekeeping, and I didn't have to be

1 trained for the job.

2 I believe Mr. Hall was trained for the 19-3 job,
3 and I didn't have to be trained. Other than that, I
4 believe that's all I have to say. Anybody have any
5 questions?

6 JUDGE RODWELL: Okay. Do you have any questions, Mr.
7 Perillo?

8 MR. PERILLO: I don't.

9 JUDGE RODWELL: When -- when -- during your
10 discussion, after the selection, with Ms. Fidler, did she
11 ask you or mention that there might be another job you'd be
12 interested in? Was that the case?

13 WITNESS: She said, "Mr. Lewis, the Floater job is
14 available, because Mr. Hall got the permanent job. I said
15 ...

16 JUDGE RODWELL: The what job is available?

17 WITNESS: The Floater ...

18 JUDGE RODWELL: Okay.

19 WITNESS: The job that I actually demonstrated -- they
20 created a job, and they gave it to him. And I told them I
21 wasn't interested, because I wanted a permanent work
22 station; because the Floater jobs takes you all over the
23 Hospital, and you really don't know where you're going to
24 be at when you come in that day; and that's why I didn't
25 care for that job.

1 JUDGE RODWELL: And at the time of the selection, you
2 were already in a Floater job?

3 WITNESS: Yes; I was.

4 JUDGE RODWELL: Are you still in a Floater job?

5 WITNESS: I would say so.

6 JUDGE RODWELL: What do you mean by you would say so?

7 WITNESS: Right now, I'm currently not -- I'm not
8 working at the VA right now; I'm off sick, per doctor's
9 orders.

10 JUDGE RODWELL: Okay. Do you plan on returning to the
11 VA?

12 WITNESS: Yes.

13 JUDGE RODWELL: Do you know when you'll be returning
14 to the VA?

15 WITNESS: When doctor says -- six months to a year --
16 that's -- he gave me that last week -- week and a half.

17 JUDGE RODWELL: Okay. Is it your desire to have -- is
18 it still your desire, upon your return to the VA to have a
19 position -- you have a full-time position; is that correct?

20 WITNESS: Uh, huh. Yes; I do.

21 JUDGE RODWELL: Okay. But it's your desire to have a
22 permanent position -- in other words, a position in a
23 particular Unit that you report to the same Unit every day?

24 WITNESS: Yes.

25 JUDGE RODWELL: Okay. I don't have any other

1 questions.

2 I don't believe. I just want to check. We're going to go
3 off the record a moment. I just want to check one thing.

4 (Off the record.)

5 (On the record.)

6 JUDGE RODWELL: We can go back on the record.

7 Mr. Johnson, how long have you been working at
8 the VA -- I mean working for the VA?

9 WITNESS: October 20th.

10 JUDGE RODWELL: Of '99?

11 WITNESS: '99.

12 JUDGE RODWELL: Okay. Did -- at the time of the
13 selection process, were there any black Housekeeping Aides
14 working on Ms. Fidler s Unit?

15 WITNESS: Well, they would work on a Unit as they
16 would float through as an assignment. Someone call off --
17 the ones we had there was Floaters; and yes; they was
18 assigned to that Unit; they would work on that Unit as a
19 Floater.

20 JUDGE RODWELL: Who made the assignments for the
21 Floaters?

22 WITNESS: The Supervisor that was in charge that day.

23 JUDGE RODWELL: Of the Unit?

24 WITNESS: Of our particular EMS Unit; Yes. What would
25 occur is if the Product Line would call and say certain-

1 certain would call in sick; and they would just assign
2 somebody to go over there.

3 JUDGE RODWELL: And so, for example, Ms. Fidler's Unit
4 might call up and say we need a replacement; someone's off
5 today, ...

6 WITNESS: Right.

7 JUDGE RODWELL: ... and your Unit Supervisor for that
8 day would assign someone to go down?

9 WITNESS: Yes.

10 JUDGE RODWELL: Okay. Do you know how many permanent
11 Housekeeper positions were in Ms. Fidler's Unit?

12 WITNESS: In her Product Line?

13 JUDGE RODWELL: Right.

14 WITNESS: Two, four, five, seven.

15 JUDGE RODWELL: Seven permanent ones?

16 WITNESS: Yes.

17 JUDGE RODWELL: Including the one that Mr. Hall
18 filled?

19 WITNESS: Yes.

20 JUDGE RODWELL: Okay. And were there -- were any of
21 those black individuals?

22 WITNESS: No; they weren't.

23 JUDGE RODWELL: I don't have any other questions. I'm
24 going to direct that you not discuss your testimony with
25 anyone outside of this hearing room as well; and you may be

1 excused. Were there -- there weren't -- were there any
2 more questions?

3 MR. PERILLO: No.

4 JUDGE RODWELL: Okay. You may be excused.

5 At this time, we will have closing arguments or
6 closing statements. Do you, Mr. Perillo or Mr. Dumas need
7 any additional time or a few minutes to prepare for your
8 closing statements?

9 MR. PERILLO: I don't.

10 MR. DUMAS: No.

11 JUDGE RODWELL: Okay. You may proceed, Mr. Dumas,
12 with your closing.

13 MR. DUMAS: Thank you, Judge. Judge, from what I can
14 see, this entire hearing goes to the credibility of the
15 witness; whether or not the witness testified in a
16 believable fashion. And very simply, Judge, I only saw one
17 person come in today that I can believe, other than Mr.
18 Johnson, and that person testified truthfully. That was
19 Mr. Houck.

20 He had nothing to gain. In fact, Mr. Houck had
21 more to lose, because he's making enemies at his workplace
22 against himself; but he was put in a situation where he
23 felt he had to do the right thing. For whatever reason,
24 actual or otherwise, he felt he had to do the right thing.

25 Insofar as Mr. Kent, Mr. Kent makes -- made

1 several self-serving statement (sic) to make certain that -
2 - and in fact, he never answered a question. He answered
3 in a way that you can't dispute him, because it seems to me
4 like -- hey, perhaps he used (sic) to doing this sort of
5 thing, and that's the way he work (sic) -- that's the way
6 he get his program across to try and convince everyone, - I
7 got it on the top of my head; I know this."

8 Okay. But he embarrassed me. I'm not -- I'm not
9 good at this thing with a person like him, because it's
10 obvious, he's a professional at it. And sometime when
11 you're a professional at something, you do it so well, then
12 you become suspect.

13 Now other people that come -- that came in here -
14 - notice particularly Ms. Fidler. I say if a person does
15 not tell the truth in their sworn testimony, and you see
16 that; then anything else that person says is suspect. The
17 investigation clearly shows Ms. Fidler was asked, "How
18 could you observe him if you do not work on weekends?" To
19 which she replied, "Oh, I mean when I come in on Mondays;
20 and then I see what he's done."

21 But the situation -- by the time she comes on
22 Mondays at 7:30, the Housekeeper s been already there,
23 doing the job. The record clearly shows that Mr. Hall
24 worked, at the time they was applying for these positions
25 and they submitted the documents, Mr. Hall had been a full-

1 time Housekeeper from June 9th to June 15th.

2 Additionally, they stuck a form in the records
3 here, in the investigative records, to try and -- try and
4 trick us here -- let us see the correct form that caused
5 Mr. Hall to get the job. This form didn't -- had no parts
6 in this record. Had absolutely no parts. The true record
7 shows that Mr. Hall was reassigned this position; and at
8 the VA Medical Center in Lebanon, seniority decides on
9 reassignments, regardless of how Mr. Kent try to circumvent
10 the truth.

11 That's it in a nutshell. Mr. Johnson was
12 entitled to the job, regardless of how Ms. Fidler may have
13 felt about him or other men of color. Mr. Houck came in,
14 and he said -- and he was reluctant to testify. He said,
15 this is what she said. I mean it looks like -- why do you
16 want me? I don't want to be a part of this, but this is
17 what she said. And to me, he was very credible. It was
18 obvious, some sort of statement was made. The record bears
19 it out.

20 Mr. Johnson stated, since he's been there, seven
21 people in Extended Care. Not one minority. To come in
22 here and say, "I recently hired a black;" it's not enough.
23 It is certainly not enough. And I understand she may have
24 said this back in '95; '92 or '93; somewhere in that
25 period, but it's evident to me today in dealing with this

1 matter, the situation still exists.

2 The black man that we heard about here today was,
3 in fact, hired. Everybody knows about his entire
4 situation. He was hired; and apparently Ms. Fidler was put
5 in a situation where she has to hire blacks now; but that
6 does not relieve her of her past conduct. It certainly
7 doesn't relieve her. It's a horrendous situation; and when
8 a person like that in authority position can do something
9 like this, she sets a pattern. Other see it. She sets a
10 pattern, and here come the Agency backing her up.

11 What does it tell anyone else? You are allowed
12 to do the same thing; therefore the problem you have at the
13 Lebanon VA.

14 It's time to say to them, -You gotta stop what's
15 going on out there.

16 Thank you.

17 JUDGE RODWELL: Mr. Perillo.

18 MR. PERILLO: Thank you, Judge. Mr. Dumas, Mr.
19 Johnson, there was testimony presented to rebut the *prima*
20 *facie* case they presented. Ms. Kohr and Ms. Fidler, the
21 Selecting Officials, the folks involved in the process. We
22 had already stipulated that Mr. Johnson was a qualified
23 finalist, along with Mr. Hall.

24 The testimony was consistent with the testimony
25 given to the EEO Investigator on the reasons for the

1 selection. Namely, Ms. Fidler testified with a degree of
2 credibility that really was not dented on any cross-
3 examination or examination question from the Judge. It was
4 based on objective analysis of written qualifications.
5 Specifically, it appears the Supplemental qualifications
6 was the tie-breaker.

7 Now it appears as though the case brought by the
8 Complainant was based on an interpretation of semantics on
9 the Supplemental Qualifications vis-a-vis each candidate.
10 Regardless of the interpretation put on it, there was no
11 evidence whatsoever admitted here at the hearing or that
12 appears in the record that there was any racial motivation
13 behind that interpretation of the Supplemental
14 Qualifications.

15 Even taking Mr. Johnson's monologue at the end of
16 the hearing as credible, and accepting his argument;
17 there's still no evidence of a race-based interpretation of
18 the Supplemental Qualification statement, which really cuts
19 to the heart of this case under the circumstances.

20 The case law is replete with situations of
21 individuals, Selecting Officials and otherwise, that have
22 been accused of discrimination who have made racial remarks
23 in the past -- one or two stray remarks in the past.

24 Now we saw credibility determinations that have
25 to be made by the Judge here on testimony by Ms. Fidler

1 that denied making that statement several years ago. Yet
2 there's still no evidence admitted here, as of record,
3 which will have to be interpreted by the Judge, under her
4 Decision, to indicate that even if that remark was made, it
5 had anything to do with this selection process.

6 Therefore, under the state of the law, there's no
7 basis for finding discrimination. The Agency so asks that
8 that judgment be made.

9 Thank you.

10 JUDGE RODWELL: Okay. I have -- I have -- I'm going
11 to go off the record a moment.

12 (Off the record.)

13 (On the record.)

14 JUDGE RODWELL: We're back on the record, and I have
15 called Ms. Fidler back in; and Ms. Fidler, you're still
16 under oath, ma'am.

17 Whereupon,

18 ALICE E. FIDLER
19 having been previously sworn, was recalled as a witness
20 herein and was examined and testified as follows:

21 JUDGE RODWELL: I have a few questions for you for
22 clarification for myself, kind of as thinking as Mr. Dumas
23 was ...

24 MR. PERILLO: Judge, I'm sorry to interrupt, just pro
25 forma I have to object.

1 JUDGE RODWELL: Okay. Objection is overruled.

2 MR. PERILLO: Thank you.

3 JUDGE RODWELL: Okay. I am calling you Ms. Fidler. I
4 -- you know, I was thinking back over questions that Mr.
5 Dumas was asking; and in response to my questions, et
6 cetera, and I just wanted some clarification on a certain
7 point.

8 With regards to Mr. Hall, his request for
9 personnel action, which was effective June 2, 1998, under
10 Tab C-3 reflects that he was transferred from the EMS
11 Operations as a Housekeeping Aide, permanent, part-time; to
12 WG-1 to a WG-2 into the Housekeeping -- into the Extended
13 Care Unit. Would that have been your Unit?

14 WITNESS: He was a float person, I think that was the
15 -- I'm not sure; but I think it was the float position that
16 was available; and at that time, the person I had on half
17 of my Unit was transferred to the Maintenance Department,
18 so he spent most of his floating time being the Relief
19 Janitor on 19-3.

20 JUDGE RODWELL: And that -- that was a float position?

21 WITNESS: Yes.

22 JUDGE RODWELL: Okay. Was that a float position in
23 your Unit?

24 WITNESS: It was a float position in the Product Line.

25 JUDGE RODWELL: What does that mean, "in the Product

1 Line"?

2 WITNESS: We are an Extended Care Product Line. There
3 are seven Units in the Product Line, and part of my
4 responsibility as a Team Leader was to supervise the
5 Housekeeping people in that Product Line. I didn't do
6 their performance appraisals. I just assigned them to the
7 areas that needed help, granted their annual leave, their -
8 - if they had any special requests.

9 JUDGE RODWELL: So you didn't do performance
10 appraisals?

11 WITNESS: Only on the employees that I had on my own
12 Unit that were assigned to me.

13 JUDGE RODWELL: What was your Unit?

14 WITNESS: Mine is 19-3.

15 JUDGE RODWELL: And that is an Extended Care Unit?

16 WITNESS: Yes.

17 JUDGE RODWELL: Okay. So Mr. -- in June -- on June 7,
18 1998, Mr. Hall was assigned as a Floater to your Unit or as
19 a Floater to the whole Product Line?

20 WITNESS: He was a Floater to the whole Product Line,
21 but I had a vacancy there; because somebody had been
22 transferred to the Engineering Maintenance Department.

23 JUDGE RODWELL: So you had a Floater position -- okay;
24 what does that mean?

25 WITNESS: Floater -- the Floater position was to help

1 cover annual leave, unplanned leave; to help do project
2 cleaning, like waxing and cleaning wheel chairs; and to
3 help clean the area in 19-1, which was a large area.

4 JUDGE RODWELL: Okay. So during that time period from
5 June 7 -- first of all, let me ask this:

6 Do you recall when you made the selection of Mr.
7 Hall for the position?

8 WITNESS: I think it was August, but I do not
9 remember. What are you -- are you asking me originally for
10 that position?

11 JUDGE RODWELL: Yes.

12 WITNESS: I did not make the selection of Mr. Hall for
13 the original position. Beulah Hadrick hired him for the
14 Float position in this Extended Care Product Line.

15 JUDGE RODWELL: Now for the position that we're here
16 for today, ...

17 WITNESS: Right.

18 JUDGE RODWELL: ... what -- do you recall when you
19 hired him or selected -- made the selection?

20 WITNESS: No; I don't remember, exactly.

21 JUDGE RODWELL: Okay. Now when you make a selection,
22 what -- what would you normally do? How would you indicate
23 the selection to the Agency?

24 WITNESS: I -- there are forms to fill out, and you
25 put on the form the person you have selected, then you send

1 it to Human Resources.

2 JUDGE RODWELL: Now at the time you fill out that
3 form, the person you selected; do you date the form that
4 you filled out the form?

5 WITNESS: I think so.

6 JUDGE RODWELL: Do you know if that would have been
7 the date you made the selection?

8 WITNESS: It should -- it should have been

9 JUDGE RODWELL: Okay. Now when Mr. Hall was a Floater
10 in your Unit, when -- when did he normally work in that
11 Unit?

12 WITNESS: He would have worked Monday to Friday, 6:00
13 a.m. to 2:30.

14 JUDGE RODWELL: As a Floater?

15 WITNESS: As a -- as a Floater, because he was placed
16 into a position that was empty -- that was vacant,
17 temporarily, until we got this position posted and filled.

18 JUDGE RODWELL: Oh, I'm -- okay -- so you're saying
19 that he was a Floater, and there was a permanent
20 Housekeeping position that was open or left vacant?

21 WITNESS: Right.

22 JUDGE RODWELL: And that he floated, let s say, into
23 that position for that time period?

24 WITNESS: That's correct.

25 JUDGE RODWELL: And that was Monday through Friday?

1 WITNESS: That's correct.

2 JUDGE RODWELL: Okay. And during that time period,
3 you were able to observe his performance?

4 WITNESS: That's correct.

5 JUDGE RODWELL: Okay. Now there's been some testimony
6 in the record that -- that you felt that Mr. Hall was a
7 better team player. Now that may not be the specific
8 testimony, but would fit into the Unit better. What did
9 you mean by that?

10 WITNESS: Mr. Johnson came to see me after this was
11 completely over, and he asked me if he could see me "off-
12 the-cuff", and discuss this. And at that time, I told him
13 that I picked the person that I felt was better -- the best
14 qualified and who would best fit into the team; but there
15 would also be a Float position available in Extended Care
16 Product Line, and I felt he would be qualified for that.

17 Mr. Johnson did well, going from Unit to Unit.
18 He had an outgoing personality, and he seemed to work well
19 with the people in most all of the areas.

20 JUDGE RODWELL: So why did you think that Mr. Hall
21 would fit into your team better, or your Unit better?

22 WITNESS: He seemed to get along with the team that I
23 have. He just seemed to fit in better and to be able to
24 work with the staff.

25 JUDGE RODWELL: Now when Mr. Johnson had an

1 opportunity to work in your Unit as a Floater, did he ever
2 work in your Unit during the week?

3 WITNESS: Yes; Yes.

4 JUDGE RODWELL: Now Mr. Hall's seeming to fit in
5 better with the staff; is that just a feeling that you had,
6 or ...

7 WITNESS: He seemed to understand the demented patient
8 and how they could be uncooperative and, you know, void
9 inappropriately or be -- maybe get in his way and move his
10 signs or things like this.

11 JUDGE RODWELL: Okay. I don't have any other
12 questions, and I primarily wanted to get some clarification
13 on Mr. Hall's work status in the Unit, once he came in --
14 into the Unit itself.

15 Are there any questions from anyone else?

16 MR. PERILLO: No.

17 JUDGE RODWELL: You have an opportunity.

18 MR. DUMAS: Just simply, from what period did you
19 observe Mr. Hall?

20 JUDGE RODWELL: I think he was there approximately
21 four to six weeks.

22 MR. DUMAS: What period ...

23 JUDGE RODWELL: As a Float?

24 WITNESS: That would have been -- he was hired as a
25 Float for me full-time, and he was on the Unit most of that

1 time as a Floater.

2 MR. DUMAS: From what period of time?

3 WITNESS: I don't remember, sir.

4 JUDGE RODWELL: The effective date is in the record on
5 C-3 when he was hired into that position, 6/7/98. That's
6 according to the record. Okay. Okay. That's the
7 effective date. Okay. That's all that I have. Thank you
8 again. And again, do not discuss the testimony with anyone
9 Ms. Fidler.

10 Off the record.

11 (Off the record.)

12 (On the record.)

13 JUDGE RODWELL: On the record. Okay. We've concluded
14 with the hearing, but I'm going back on the record. I just
15 want to make sure. I think I introduced these, but I'm
16 admitting into the record Hearing Transcript Exhibit C-1,
17 and that is the Article 12 excerpt from the Master
18 Agreement between the VA and the American Federation of
19 Government Employees dated 1997. That is admitted into the
20 record, and the parties are, you know, again instructed to
21 keep their copies of this. They won't be attached to the
22 copies of the transcript, only the original transcript.

23

24 (The document previously marked for identification
25 as exhibit C-1 was admitted into evidence)

1 Thank you. Off the record.
2 (Off the record)
3 (Whereupon, the hearing was concluded)
4

REPORTER'S CERTIFICATE

DOCKET NUMBER: EEOC COMP. No. 170-AO-8163X

AGENCY NUMBER: 98-2320

CASE TITLE: Lewis Johnson v. Hershel Gobel, Acting
Secretary, Department of Veterans Affairs

HEARING DATE: July 26, 2000

LOCATION: Philadelphia, Pennsylvania

I hereby certify that the proceedings and
evidence herein are contained fully and accurately on the
tapes and notes reported by me at the hearing in the above
case before

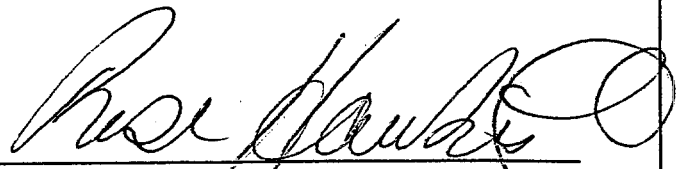
THE HONORABLE DONNA NUTTER-RODWELL

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and that this is a true and correct transcript of the case.

Date:

8/1/00



Official Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEWIS JOHNSON,
Plaintiff

v.

ANTHONY PRINCIPI, Acting Secretary of
Veterans Affairs; et al.,
Defendants

No. 1:CV-00-1873

(Judge McClure)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That this 16th day of August, 2002, she served a copy of the attached

**FEDERAL DEFENDANTS' RECORD IN
SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT:**

VOLUME III

by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at Harrisburg, Pennsylvania.

Addressee:

Andrew J. Ostrowski, Esquire
4311 North Sixth Street
Harrisburg, PA 17110


KATE L. MERSHIMER
Assistant U.S. Attorney